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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 741

GEORGE D. FINLEY, ET ALS.,

Appellants,

vs.

THE CITY OF TARRANT CITY, A MUNICIPAL CORPORATION, ET ALS.,

Appellees

APPEAL FROM THE SUPREME COURT OF ALABAMA

To the Honorable Lucien D. Gardner, Chief Justice of the Supreme Court of Alabama:

Pursuant to the provisions of Rule No. 12 of the Supreme Court of the United States, the above named complainants and appellants file this their separate statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment or decree of "Correction and affirmance" appealed from herein, as follows:

STATEMENT AS TO JURISDICTION

1. Nature of Case and Statutory Provisions Sustaining Jurisdiction

This is an appeal under Section 237(a) of the Judicial Code, as amended (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. 344(a)), from a final judgment or decree of the

Supreme Court of Alabama entered October 16th, 1947, rehearing denied December 18th, 1947. The facts from which it arises may be briefly stated as follows:

On August 12, 1935, George D. Finley, Hattie Finley, Alta Finley and Frances Finley, appellants, filed their suit in the Equity Division of the Circuit Court of Jefferson County, Alabama, against The City of Tarrant City, a municipal corporation, and Z. D. McCuen, Clerk of said City, appellees, seeking, as pertinent to this appeal, the recovery or the reasonable value thereof of certain strips of land owned by appellants, which said City took without conveyance or condemnation proceedings to widen, enlarge or on which to form, Jackson Boulevard or street, Elm avenue, and an "alley"; damages for the "changing of the grade" of said Jackson street and of Elm avenue making it impracticable to get to or from said streets to the adjacent lands of appellants, in many places, such damages being a "taking" of said damaged property within the meaning of Section 1, Amendment 14, of the Constitution of the United States, which prohibits said City from depriving appellants of their property without due process of law; a declaratory judgment declaring said Ordinances Nos. 12, 38, and S-1, under which said lands were taken and said improvement assessments made were illegal and void within the meaning of Section 1, of the 14th Amendment to the Constitution of the United States, which prohibits the City of Tarrant City from adopting any Ordinance which deprives the appellants of their property without due process of law, or denies to them the equal protection of the law; a judgment or decree declaring that Ordinance No. 38, adopted in 1929 by said City, which provided for the improvement (including the grading thereof) of Jackson Street, and which provided that the costs thereof (including the grading) should be assessed against complain-

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ants and appellants property abutting thereon, impaired the contract said City made with Mrs. N. J. Finley, July 7th, 1924, whereby said City agreed, in consideration of a strip of land for a right of way for said Jackson Street, would improve and grade said street at said City's expense and without expense to said Mrs. N. J. Finley, or her heirs or assigns, as provided in said conveyance, said Ordinance No. 38, being repugnant to Section 10, Art. 1, of the Constitution of the United States which prohibits said City of Tarrant from passing any Ordinance impairing the obligation of said contract of July 7th, 1924, made with the mother and ancestor of appellants; a recovery of, or reasonable compensation therefor, of an easement or right of way, 30 feet wide and 877 feet long, forming now a part of Jackson Boulevard or street, which said right of way was acquired in 1916 by the predecessor of the Birmingham Electric Co., for a street car railroad in a condemnation proceeding against Mrs. N. J. Finley, mother and ancestor of appellants, which said easement or right of way was abandoned (and same reverted to the estate of appellants) when said Birmingham Electric Co., conveyed its title thereto to said City of Tarrant City for a street on Jackson Boulevard, said company reserving in said conveyance only 10 feet for a single track railway, and the right to place poles along said street—and in which conveyance said City agreed to and did remove said track of said railroad company, and grade and pave said right of way all but said 10 feet reserved, the costs and expense thereof, not being assessed against said Birmingham Electric Co., but was switched over and charged in and made a part of the assessments made against appellants,—said Ordinance, said assessments and conduct of said City being repugnant to Section 1 of the 14th Amendment to the Constitution of the United States, which prohibits said City of Tarrant

from depriving appellants of their property without due process of law; a specific performance of the contract entered into between said City and Mrs. N. J. Finley July 7th, 1924, whereby said City agreed, in consideration of a right of way 30 feet wide and 877 feet long, on Jackson Street, it would Grade said street (said grading being about 95% of the cost thereof of said improvement) at said City's expense and without expense to said Mrs. Finley or her heirs (said Grading it was agreed should be done by said City within a reasonable time, but which was Not done until 1929 when said City graded and paved said street and Then Charged All of the Cost Thereof) (including the Grading thereof) as a part of the assessments for said improvements against appellants, and specific performance being denied appellants so as to eliminate said cost of said Grading of said street, and require said City to comply with its said Contract of July 7, 1924, and pay itself for said GRADING said Ordinance and assessments thereunder and said conduct of said City, will deprive appellants out of their property without due process of law in violation of Section 1 of the 14th Amendment to the Constitution of the United States; it was also shown in said suit that said streets had not been legally dedicated to the public, including said "alley", but that only a small portion of said property consisting of a few lots therein had been recorded as lots, the balance being in acreage.

The Protest, Objections and Defenses to said assessments (which was the first and only paper in the nature of a pleading provided by the statutes of Alabama to be filed) which was filed prior to September 23, 1930, with the Clerk of said Municipality, appellee, charged among other things, that said Ordinances and the assessments made thereunder were illegal and void, and repugnant to the Constitution of the United States. Said protest, objections and defenses

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were overruled, whereupon within 20 days thereafter, as provided by law, appellants perfected their appeals to the Circuit Court of Jefferson County, Alabama, in which they demanded a jury for the trial of same on appeal. It is further shown that said City Mayor approved said appeals and bonds; that they were never sent up to the Circuit Court, as provided for by law, and that nothing was done by said City until July-August 1935, After Mrs. N. J. Finley and her husband, Dr. W. M. Finley, father of appellants had both passed away. Then is when the City got busy and advertised said property for sale to satisfy said assessments, whereupon appellants Not being advised thereunto, except that they saw said advertisement in a local newspaper, they filed said suit August 12, 1935, to restrain and enjoin said City from selling said property Until Appellants Could Get A Trial On Their Appeals They Had Taken To The Circuit Court, in 1930. The case was passed from time to time by agreement of the attorneys for both sides, and some amendments were made (the law and rules of court in Alabama being very liberal in amendments, allowing an amendment any time before final decree).

In the original bill of complaint, and all of the amendments thereto, it was alleged that said Ordinances and assessments made thereunder were illegal and void, being repugnant to the Constitution of the United States; and the lands illegally taken by said City to form or widen or enlarge said Streets and "alley" belonged to appellants, and they were suing therefor, or the reasonable value thereof. In its ruling on the pleadings November 12th, 1946, the lower State court held that appellants were entitled to injunctive relief to prevent the sale of said property pending the hearing on said appeals theretofore taken in 1930 by appellants from said City to the Circuit Court,

but denied appellants all other relief, and dismissed said complaint as to all other relief except the injunctive relief.

The case was then appealed to the Supreme Court of Alabama, and it rendered a judgment or decree on October 16th, 1947, "Correcting and Affirming" said lower State court, in which said Supreme Court held that appellants were entitled to said injunctive relief, and also to recover for land illegally taken by said City to widen or enlarge Elm Avenue, but denied appellants all other relief. Application was then made by appellants for a rehearing, which said Supreme Court overruled on December 18th, 1947, at which time said cause or judgment therein became final.

2. State Statute (Ordinance) the Validity of Which Is Involved; and the Contracts Made by Said City With Mrs. N. J. Finley, and Also With Birmingham Electric Co., Pertinent Thereto.

There was thus drawn in question the validity of said Ordinances Nos. 12, 38, and S-1, under the Fourteenth Amendment to the Constitution of the United States, and also under the clause of Section 10, Article 1 of the Constitution of the United States. Said Ordinances, *except Ordinances* S-1, which the Clerk of said City and Counsel for appellants were unable to locate at City Hall of said City, are set out in full, attached hereto, and marked as follows:

(1) Ordinance No. 38, Exhibit A; (2) Ordinance No. 12, Exhibit B; said contracts are set out and made exhibits hereto as follows: (3) Contract of said City with Mrs. N. J. Finley, of July 7th, 1924, Exhibit C; (4) Contract by said City and Birmingham Electric Co., Exhibit D; a copy of the list of the assessments made (including the "Alley" assessed under Ordinance S-1, the sewer Ordinance, showing the strip of land illegally taken by said City to form said

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alley 15 feet wide and 366 feet long on appellants' property) Exhibit E; a copy of the Protest, Objections and Defenses to said assessments filed with the Clerk, Wallace Wells, of said City a few days prior to September 23rd, 1930, when same were made final, Exhibit F; a copy of the Affidavit of Wallace Wells, the then Clerk of said City, showing that said appeals were duly taken and approved by the then Mayor of said City, Exhibit G.

Date of Judgment or Decree: Finality Thereof: and Date of Appeal

The complaint of appellants in the lower state court contained several counts or paragraphs, in which various strips of land taken by said City to widen, enlarge, or on which to form streets or an alley, and other relief, were sought to be recovered. In its Decree "Correcting and Affirming" the decree of the lower court wherein said lower court held that appellants were entitled only to injunctive relief; said Supreme Court held that appellants were entitled to injunctive relief and Also the right to recover the land taken by said City to widen, enlarge, or form Elm Avenue, but denied appellants the right to recover lands taken in Jackson Boulevard, or the "Alley", and all other relief.

Said final decree of the Supreme Court of Alabama, unless reversed or modified, prevents appellants from recovering said strips of land in said other streets or the alley, and also other important relief sought by them in their said suit.

> "Where there are two or more counts in a declaration alleging distinctly different causes of action, there may be more than one final judgment on which writs of error may be taken, and the fact that such distinct judgments are contained in the same entry, and that one in favor of the plaintiff on one count has been satisfied, will not prevent his maintaining a writ of

error to review another in favor of defendant on different counts to which demurrers were sustained." *Washington v. Beeman,* 91 Fed. 232; *Collins* v. *Metro-Goldwyn Pictures Corp.,* 106 Fed. 2d 83; Note 48, Harv. L. Rev. 302, 304; *Comment,* 41 Mich. L. Rev. 535; *Moreno v. United States,* 120 Fed. 2d 128.

The final judgment or decree of the Supreme Court of Alabama plainly sustained the constitutionality of said Ordinances and assessments made thereunder, the taking of the strips of land (except Elm Avenue) of appellants, and the legality of the inclusion of the cost of removing the car track of the Birmingham Electric Co., and cost of grading and paving its said right of way to appellants, under the Fourteenth Amendment to the Constitution of the United States, and also under the 10th Section of Article 1, of the Constitution of the United States.

The said judgment of the Supreme Court of Alabama was rendered on October 16th, 1947, and rehearing denied December 18th, 1947. Petition for appeal to this Court was presented to the Honorable Lucien D. Gardner, Chief Justice of the Supreme Court of Alabama, on the 11 day of March 1948, and was by him allowed on the 11 day of March, 1948.

Manner in Which Federal Questions Were Raised

The Federal questions were raised at the outset; first, in the Protest, Objections and Defenses filed in 1930 in the Office of the Clerk of said City (Tr. 55); then, in the Original Bill filed August 12th, 1935 (Tr. 5); then in the Substitute Bill filed in 1941 (Tr. 46, 47); then in the Amendment to Substitute Bill (Tr. 67, par. E; Tr. 68, par. F; Tr. 69, par. 1; Tr. 70, par. K; Tr. 71, Par. L; Tr. 70, par. N; Tr. 74, par. Q, 1, 2, 3), and also in the Assignments of Error filed on appeal from the lower state court. The Protest, the Plead-

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ings, and also the assignment of errors, each and all, alleged that said Ordinances were null and void because they deprived appellants of their property without due process of law and denied them the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States, and that Ordinance No. 38, impaired the obligation of the contract made July 7th, 1924 for the right of way said City acquired from Mrs. N. J. Finley, mother and ancestor of appellants, (Tr. 4, par. 7; Tr. 5, par. 12; Tr. 38, par. 3; Tr. 38, par. 2; Tr. 39, par. 4; Tr. 49, par. 6; Tr. 44, Par. 12; Tr. 44, par. 13; Tr. 45, par. 15, Secs. (b), (c), (d), (f), (i), (j), (m), (n); Tr. 66, par. D; Tr. 67, par. E; Tr. 68, par. F; Tr. 68, par G; Tr. 69, par. H; Tr. 69, par. I; Tr. 70, par. J; Tr. 71, par. L; Tr. 72, par. M; Tr. 72, par. N; Tr. 73, par. O; Tr. 74, par. P;) as being repugnant to the Constitution of the United States, Clause 10, or Article 1, and the Fourteenth Amendment, Sec. 1, of the Constitution of the United States. It was also clearly set forth in said pleadings by appellants that said Ordinances Nos. 12, and 38 and assessments thereunder on streets along or over which the street car line of the Birmingham Electric Co. operated in said City, were illegal in that said City did not comply with Section 2189 of the Code of Alabama for 1923-28 (Tit. 37, Sec. 528, Code, Ala., 1940) which requires Mandatorily that said City assess its proportionate cost of any improvements along such street car line right of way; that said City's said act in exempting said street car company from paying any of said improvement was ultra vires, illegal and void; and that in "shifting" onto appellants said improvement expense which the STATUTE OF ALABAMA required said Railroad Co. to pay, said City deprived appellants of their property without due process of law, and denied to them the equal protection of the law, in violation of the Constitution of the United States, Sec. 1 of 14th Amendment, and Sec. 10 of

Art. 1, thereof. (Tr. 3, par. 6; Tr. 5, par. 12; Tr. 45, par. 15, sec. (d), Tr. 47, par. (j); Tr. 67, par. E; Tr. 74, par. Q. 2.).

The opinion of the Supreme Court of Alabama, a copy of which is appended to this Statement (Exhibit H) shows that the Federal questions were presented to, considered and decided by it:—(The opinion of the Supreme Court of Alabama has not yet been officially reported, but is unofficially reported in *Finley, et als.* v. *Tarrant City, et als.*, 32 So. 2d. 806, Advance Sheets of Southern Reporter, issued Jan. 15, 1948).——

Excerpts from the opinion of the Supreme Court of Alabama:

(Par. 3, page 807, 32 So. 2d. 807)—"The following is a brief summary of the allegations of the *substitute bill.* The complainants are the heirs at law of their mother, Mrs. N. J. Finley, who died in August 1932, and who owned the property involved in the suit. Mrs. N. J. Finley, on July 7th, 1924, deeded certain strips of land to be used as a street, in consideration of which the City agreed to relocate certain fences on her adjacent property, build a retaining wall to protect the adjacent property and GRADE the property adjoining the strips so deeded. Thereafter in 1930 the City did improve the street, but *contrary to its agreement it charged the grading and other unlawful expenses against the adjacent property*"—(a part of which)—"was platted into lots".—(Interpolation and emphasis supplied.) "The aforesaid strips of land, together with the land previously acquired from Mrs. Finley by the Birmingham Electric Company for a *right of way for street railway purposes* and *subsequently acquired by the City from that Company for street purposes,* became Jackson Boulevard"—Emphasis supplied.

Par. 6 of the Opinion: page 808: "It is alleged in the

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substitute bill that *Jackson Boulevard is not a public street but belongs to complainants*"—(Emphasis supplied).

Par. 15, page 809:—"The amendments to the substitute bill may be summarized as follows. Five paragraphs seek to recover possession of certain tracks of land from the City of Tarrant City. These tracts of land are portions of Elm Avenue, *Jackson Boulevard*, and *an alley.*"—"and *one paragraph* is for *the taking the lands without due process—lands now forming the alley or located in public streets* on which the lots abut. —It is claimed that the *strips of land on the sides of Jackson Boulevard were procured from Mrs. Finley by deed from her to the City but that provisions of the deed providing for relocation of certain fences, construction of a retaining wall and etc.*, (Note: the "etc" means the GRADING of Jackson Boulevard)—"were not complied with."—"It is claimed that a strip of land forming the center of Jackson Boulevard was acquired from Mrs. N. J. Finley by the Birmingham Electric Co., by *proceedings condemning the strip as a right of way* for STREET RAILWAY PURPOSES. It appears that on *August 22, 1929*, Birmingham Electric Co., *conveyed its right of way* to the City of Tarrant City for STREET OR HIGHWAY PURPOSES. It is *claimed* that since the Birmingham Electric Co., ABANDONED the right of way the title REVERTED to Mrs. Finley. In its deed to the City the Birmingham Electric Co., reserved the right to maintain and operate a street railway over the land"—(ONLY 10 feet, See Exhibit D, attached hereto) —"with necessary tracks, poles, etc."—(Interpolation and emphasis supplied).

Par. 17, page 809: "(1) *Upon careful consideration we have concluded* that this Court in its aforesaid opinion in *Ex parte Finley, et al. supra*, decided in principle much of what is here presented."—(*Ex parte Finley* is reported in 246 Ala. 218, 20 So. 2d. 98, was a MANDAMUS proceeding to

require the Judge of the lower state court to vacate its order sustaining objections of the City to answer certain interrogatories propounded to the City by appellants. The City had been *very reluctant* to make *any discovery* or *answer* any interrogatories in said case.—(Interpolation and emphasis supplied).

Par. 18, page 810: "We think that the allegations in *ejectment*, trespass, *breach of contract*, and for *specific performance*, sought to be set up and advanced in the Amendment to the substitute bill, *among other things*, are too far removed from the rights sought to be established in the substitute bill to admit of amendment."—"But there is a claim ORIGINALLY made an issue by the SUBSTITUTE BILL and its answer and set forth in *paragraph C of the amended bill*, with reference to the *land in Elm Avenue*, which should receive *our consideration*. It is the claim for taking the land in Elm Avenue *without just compensation*."—(Emphasis supplied).

Par. 19, Page 910: "• • • If the City took the property of Mrs. Finley to form part of Elm Avenue without compensation,—there is no suggestion that she gave a deed,—and such claim, if any, is not barred by laches, the statute of non-claim or the statute of limitations, then the court will grant relief in such respect by fixing just compensation therefor, with injunctive relief if necessary, because under those circumstances, the right to compensation persists. *Jones* v. *New Orleans and Selma R. R. Co.*, 70 Ala. 227; *Thornton* v. *Sheffield & B'ham R. Co.*, 84 Ala. 109, 4 So. 197; 5 Am. St. Rep. 337; *City of Birmingham* v. *Ala. Home Bld. & Loan Ass'n.*, 231 Ala. 558, 165 So. 817; *City of B'ham* v. *Smyer*, 230 Ala. 234; 160 So. 764."

Par. 20, page 810: "We see nothing in the case which should give the complainants any further right of amendment." (See copy of Opinion Supreme Court of Alabama,

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Exhibit H, hereto attached. Also a copy of the decree of the lower state court appears in Exhibits 1 and J, hereto attached).

The Federal Questions Involved Are Substantial

The ultimate Federal questions presented to the Supreme Court of Alabama were:

A. The validity under the Fourteenth Amendment to the Constitution of the United States of the Ordinances Nos. 12, 38 and S-1 and the assessments made thereunder, when the City had Not acquired *title from appellants* to the right of way for said Streets and Said Alley:

1. Whether said City in taking said lands to form, enlarge or widen said Jackson boulevard and the alley, without conveyance or condemnation proceedings, deprived appellants of their property, without due process of law, in violation of the 14th Amendment to the Constitution of the United States, which prohibits said city from depriving appellants of their property, or from denying the appellants the equal protection of the law.

2. Whether said City in "changing the grade" of the streets—Elm and Jackson—making ingress and regress to appellants' adjacent lands impracticable in many places, was a depriving of appellants of their property in violation of the 14th Amendment to the Constitution of the United States.

3. Whether the agreement between said City and said Birmingham Electric Co. made in 1929, whereby said City agreed to remove the track of said company 2 ft. or more into the center of said Jackson Boulevard at the city's expense, and also to grade and improve and pave said right of way of said B'ham Electric Co., was illegal, null and

void, and untra vires, under Section 528, Tit. 37, Code of Ala., Section 2189 Code Ala., 1923-28); and whether or not the charging or including said COSTS OF SUCH REMOVING CAR TRACK, GRADING AND PAVING of said company's right of way and making same a part of the assessments made against appellants was a depriving of appellants of their property without due process of law under Section 1, of 14th Amendment to Constitution of the United States, and also denied to them the equal protection of the law.

B. Whether Ordinance No. 38, adopted by said City in 1929,—(AFTER the deed or agreement of JULY 7th, 1924, said City made with Mrs. N. J. Finley) IMPAIRED the contract of July 7th, 1924, wherein said City agreed to GRADE the said right of way on *Jackson Boulevard* at SAID CITY'S EXPENSE by violating Section 10 of Article 1, of the Constitution of the United States, which prohibits the City from passing any ORDINANCE *impairing the contract of appellants* made July 7, 1924. (See Exhibits A and B for Ordinances 38, and 12; See Exhibits C and D for the contracts made by the City with Mrs. Finley, and also with B'ham Electric Co.).

C. Whether the right of way acquired in 1916 by B'ham Electric Co. for STREET CAR RAILWAY USE ONLY, in a condemnation proceeding against Mrs. N. J. Finley, WAS ABANDONED in 1929 when said B'ham Electric Co. conveyed said right of way RESERVING ONLY TEN (10) FEET FOR A SINGLE TRACK railway, to said City, REVERTED TO THE ESTATE OF APPELLANTS and in NOT acquiring title thereto from said appellants, same was taken and is using same without due process of law, in violation of the 14th amendment to the Constitution of the United States, and/or that appellants are being thus denied the equal protection of the law.

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1. Whether the City acquired ANY TITLE to said right of way, or any portion thereof, to Jackson Boulevard, and if not, then said B'ham Electric Co. still owns said right of way, and under the statutes of Alabama is charged with the assessments and costs of grading, etc. Its said right of way; or, whether, if the City acquired some or any title whatever from said B'ham Electric Co., whatever portion of said right of way said City acquired title to, REVERTED to appellants and NOT having acquired title thereto from the appellants, said City is depriving appellants of their property without due process of law, in violation of the 14th Amendment to the Constitution of the United States; and in charging in and "shifting" said costs of grading and paving said right of way for said B'ham Electric Co., said ADDITIONAL BURDEN ON APPELLANTS TO PAY SAID COSTS, was a depriving of appellants of their said property, and a denial of the equal protection of the laws of appellants.

In sustaining the validity of said Ordinances and the assessments thereunder and the right of said City to take appellants property in the "*Alley*" and on *Jackson Boulevard,* and in allowing said City to damage said adjacent property of appellants in constructing and laying out and grading said streets—"changing the grade"—without compensation to appellants therefor, the Supreme Court of Alabama decided an important Federal Question in a way which conflicts with the Fourteenth Amendment, Section 1 of the Constitution of the United States, and of applicable decisions of this Court.—*Pamphelly* v. *Green Bay Co.,* 13 Wall. 166, 20 L. Ed. 557; *Gozzler* v. *Georgetown,* 6 Wheat. 593; *Chicago B. & Q. R. Co.* v. *City of Chicago,* 17 S. Ct. 581, 166 U. S. 266, 41 L. Ed. 979; *West* v. *Chesapeake, etc. Tel. Co.,* 55 S. Ct. 894, 295 U. S. 662, 79 L. Ed. 1640.

In holding that Ordinance No. 38 adopted by said City in 1929 did not impair the obligations of the contract made

by said City with Mrs. N. J. Finley in July 1924, the Supreme Court of Alabama decided an important Federal Question in a way that conflicts with Section 10 of Article 1, of the Constitution of the United States, and of applicable decisions of this Court.—*Ohio Life Ins. & Trust Co.* v. *Debatt,* 57 U. S. 416, 16 How. 416, 14 L. Ed. 997; *Gelpe* v. *City of Dubuque,* 68 U. S. 175, 1 Wall. 175, 17 L. Ed. 520; *Graham* v. *Folsom,* 26 S. Ct. 245, 200 U. S. 248, 50 L. Ed. 464; *Fletcher* v. *Peck,* 10 U. S. 87, 6 Cranch 87, 3 L. Ed. 162; *Trustees of Dartmouth College* v. *Woodward,* 17 U. S. 518, 4 Wheat. 518, 4 L. Ed. 629; *Houston & T. C. R. Co.* v. *State of Texas,* 20 S. Ct. 545, 177 U. S. 66, 44 L. Ed. 673.

In holding that the "changing of the grade" of said streets, and the damage thereby to appellants' property, did not amount to a taking of said property, and was not in violation of the 14th Amendment of the Constitution of the United States, the Supreme Court of Alabama decided an important Federal Question, which conflicts with the Fourteenth Amendment, Section 1 of the Constitution of the United States and of applicable decisions of this Court.—*U. S.* v. *Manufacturing Co.,* 112 U. S. 645, 5 S. Ct. Rep. 306; *Crane* v. *Hahlo,* 42 S. Ct. 214, 258 U. S. 142, 66 L. Ed. 514.

In holding that said City had the legal right to make an agreement with the Birmingham Electric Co., whereby said city REMOVED into the center of said street 2 feet or more of said track in Jackson Boulevard, and graded and paved said right of way for said B'ham Electric Co., without any cost or expense therefor to said B'ham Electric Co., was NOT ULTRA VIRES, and NOT in violation of the statute of Alabama which MANDATORILY HOLDS that such street railroads shall pay for such improvements; and in further holding that the "shifting" and including said BURDENSOME EXTRA COSTS AND EXPENSE WHICH SHOULD HAVE BEEN, UNDER THE LAW, PAID BY SAID RAILROAD COMPANY,—and making same

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a large portion of the assessments against appellants, did not deprive appellants of their property without due process of law, decided an important Federal question, which conflicts with said 14th Amendment, Section 1 of the Constitution of the United States, and of applicable decisions of this court.—*Choctaw O. & G. R. Co.* v. *Mackey*, 41 S. Ct. 582, 256 U. S. 531, 65 L. Ed. 1076; *Georgia Ry. & Electric Co.* v. *City of Decatur*, 56 S. Ct. 606, 297 U. S. 620, 80 L. Ed. 925; *Ill. Cent. R. Co.* v. *City of Decatur*, 13 S. Ct. 293, 147 U. S. 190, 37 L. Ed. 132; *Okla. Ry. Co.* v. *Severns Paving Co.*, 40 S. Ct. 73, 251 U. S. 104, 64 L. Ed. 168.

From the pleadings all the way through said suit, from the original bill (Tr. 1, par. 2) and the substitute bill (Tr. 38, par. 2) and the amendment to substitute bill (Tr. 71, 73) appellants claimed said land taken for said "ALLEY", and a PRAYER FOR GENERAL AS WELL AS SPECIAL RELIEF; said Ordinance S-1, taking said "alley" was adopted October 2, 1923; it was NOT 20 years from 1923 to 1935, when the Original Bill was filed, in which said "alley" was claimed; it was NOT 20 years from 1923 to 1941 when the SUBSTITUTE BILL WAS FILED, in which said "alley" was also claimed; it is, therefore, clear that said City never acquired said "alley" by prescription (which in Alabama requires 20 years public user, etc.,) and said City never acquired said "Alley" by deed or condemnation proceedings, and denying appellants their claim therefor is in violation of the 14th Amendment to the Constitution of the United States as claimed in said pleadings.

It MUST BE REMEMBERED that this case REALLY STARTED in 1930 before the Mayor and Councilmen of said City, when they made said assessments; and when the PROTEST was filed, attacking the CONSTITUTIONALITY under the United States Constitution the said ORDINANCES AND ASSESSMENTS (See Protest, Tr. 55); and when said assessments were appealed to

the CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA; but which were NEVER sent by said City and for that REASON it became necessary for appellants to file its original BILL in the Chancery Court of Jefferson County, to restrain said City from taking said property without due process of law. That after said Chancery Court acquired jurisdiction of the injunctive proceedings, it had jurisdiction of the case for ALL PURPOSES, even to the granting of pure LEGAL RELIEF. In par. 5 of the original bill, filed August 12, 1935, it was alleged (Tr. 3) that said City "damaged" said property by "changing the grades" of said streets, Jackson and Elm avenues; in par. 12 thereof, (Tr. 5) it was alleged that said City was attempting to "confiscate' said property; in par. 6 of the original bill (Tr. 3) it was alleged that the cost of improving the right of way for Birmingham Electric Co. was illegally charged to appellants; in par. 7 of original bill (Tr. 4) it was alleged that said City agreed in July 1924 to pay for said grading and improving said Jackson Boulevard in consideration of said 30 feet by 877 ft. strip of land for a street. In the SUBSTITUTE BILL (Tr. 38, par. 3), it was alleged that said Jackson Boulevard belonged to appellants, including the right of way abandoned by the Birmingham Electric Co. when it sold same to the City in 1929; also in said substitute bill (Tr. 46, par. 15,(d)) it was alleged that the "moving and grading" said car line right of way was illegally charged to appellants; also in par. (j) (Tr. 47) said Ordinances and assessments were alleged to be in contravention of the United States, the 5th and 14th amendments thereof; in par. (m) (Tr. 47) it was charged that said Ordinances and assessments IMPAIRED the contract made by said City with Mrs. N. J. Finley in July 1924; in the PROTEST (Tr. 55) which was made a part of said substitute bill, it was alleged, among other things, as follows: Par. 3: "For that said property was DAMAGED

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by said alleged improvements"; Par. 5: "For that under that certain deed of July 7, 1924, conveying the right of way to said City for a public street said City agreed to GRADE same, or improve same, at its own expense and without expense to said property"; Par. 6: "For that said laws and Ordinances under which said alleged improvements were done are ILLEGAL AND VOID"; Par. 7: "For that said alleged improvements and assessments were NOT done according to law"; Par. 8: "For that the moving of said street car line, and the assessments therefor was illegally charged to said property"; Par. 9: "For that said laws and Ordinances and assessments made thereunder violate the Constitution of Alabama, and also the Constitution of the United States." (Note: Under the law of Alabama only a GENERAL PROTEST is sufficient in such cases, as ruled by our Supreme Court).

IT MUST BE REMEMBERED that the deed of July 7th, 1924 to said street right of way was NOT even partly complied with by said City until 1930 when it improved said Jackson Boulevard; also that 20 years HAD NOT RUN BETWEEN July 7th, 1924, and September 23rd, 1930; nor had 20 years RUN between July 7, 1924 and August 12, 1935 when the ORIGINAL BILL was filed; nor had it run between July 7th, 1924 and June 14, 1941 when the SUBSTITUTE BILL WAS FILED, containing said PROTEST as a part thereof; NOR has said Jackson Boulevard been a PUBLIC WAY FOR 20 years even to THIS GOOD day of March 1948; and it will NOT HAVE BEEN USED AS A PUBLIC WAY until September 1949. It is also shown in said pleadings that said City after accepting said appeal bonds, held said appeals away FROM THE CIRCUIT COURT wherein a jury trial in each assessment was ordered, for five years, that is, until 1935, when the Original Bill was filed by appellants; and that said act of withholding said APPEALS away from being tried, was a depriving appellants of due process

of law, in violation of the Constitution of the United States, 14th Amendment; it was also shown or argued in said cause, that the City could not take advantage of its OWN WRONG,—hold out said appeals, then claim running of statute of limitations against appellants; to so allow such procedure would be to AID said City to deprive appellants of their property without due process of law, and aid said City to DENY appellants the equal protection of the law.

It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal under Section 237 (a) of the Judicial Code, as amended.

(S.) GEO. T. FINLEY, and
FRED G. MOORE,
Attorneys for appellants.

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EXHIBIT "A"

(Exhibit 5, Tr. p. 89)

THE FOLLOWING IS A COPY OF ORDINANCE NO. 38, WHICH PROVIDED FOR THE GRADING AND PAVING OF JACKSON STREET BY COMPLAINANTS'S PROPERTY IN TARRANT CITY, ALABAMA. ADOPTED SEPT. 3, 1929

Improvement Ordinance No. 38

"An Ordinance to provide for certain improvements on Jackson Street from the North-east property line of Park avenue (formerly Michigan Street) to the South-west property line of Sloan avenue.

BE IT ORDAINED, by the City Council of the City of Tarrant City, Alabama, as follows:

Section 1. That Jackson Street from the Northeast property line of Park avenue (formerly Michigan Street) to the Southwest property line of Sloan avenue shall be graded.

That the roadway for a width of 22 feet on each side of the center line of Jackson Street from the Northeast property line of Park avenue (formerly Michigan Street) to the Southwest property line of Thomason avenue shall be paved with one course Portland cement concrete pavement 7 inches thick with integral curb 6 inches thick.

That the roadway between the gutter lines of Jackson Street from the Northeast property line of Thomason avenue to the Southwest property line of Sloan avenue shall be paved with one course Portland cement concrete pavement 7 inches thick.

That the roadway within the driveways of all intersecting streets or avenues between said points of improvement shall be paved with one course Portland cement concrete 7 inches thick with integral curb 6 inches thick.

Provided, however, that the area between the tracks and the rails of the tracks and for 29 inches outside of the outside rails of the tracks of the Birmingham Electric Company on Jackson Street between said points of im-

provements shall not be paved with concrete pavement but shall be macadamized.

That the sidewalk on the Northwest side of Jackson Street from the Northeast property line of Park avenue (formerly Michigan Street) to the Southwest property line of Thomason Avenue and the sidewalk on the Southeast side of Jackson Street from the east property line of alley running North and South through block 3, Sam Cargo's Second Addition, to the Southwest property line of Thomason Avenue shall be paved with Portland cement concrete sidewalk pavement 5 feet wide and

That stone headers shall be set in concrete across the roadways of all intersecting streets and avenues along the Northwest and Southeast property lines of Jackson Street, between said points of improvement.

That the entrances to lots along said avenue shall be paved for a width of 4 feet with Portland cement concrete sidewalk paving for the full width of the said walk and the driveways into lots and the alley-ways shall be paved with Portland cement concrete paving 6 inches thick for the full width of the sidewalk.

That vitrified clay or concrete drainage pipes, concrete drainage structures, inlets and manholes, of brick and castiron covers shall be constructed between said points of improvement.

Section 2. That said improvement shall be made in accordance with the established grades on file in the office of the City Clerk for said portions of said highway and according to full details, drawings, plans and specifications and surveys of said work and estimates, which shall be prepared by the engineer, as early as practicable, and placed by him on file in the office of the City Clerk, not later than two weeks prior to the date named in Section 4, of this Ordinance, where property owners who may be affected by said improvement may see and examine the same.

Section 3. That the cost of constructing said improvements shall be assessed against the property abutting on the portions of the highways so improved, provided:

(a) That the cost of improvements at or upon street, avenue or alley intersections, shall be assessed against

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the lots or parcels of land abutting on said highways so intersecting for one-half block in each direction.

(b) That the cost of sidewalk improvements on street and avenue corners shall be assessed against the lots or parcels of land abutting on or nearest to said improvements, and the cost of sidewalk improvements at the intersection of any alley with a street, avenue, or other highway shall be assessed against lots or parcels of land abutting or cornering on the alley at such intersection.

(c) That no assessment shall exceed the cost of such improvements or the increased value of said property by reason of the special benefits derived from such improvements.

Section 4. That the estimated cost of said improvements is $36,300.00 and that the City Council of the City of Tarrant City will meet on the 15th day of October 1929, in the Council chamber of the City Hall of Tarrant City at 7 P. M. o'clock to hear any objections, remonstrances or protests that may be made to said improvements, the manner of making the same or the character of materials to be used.

Section 5. That this Ordinance shall be published as required by law and notice by registered mail shall be given by the City Clerk to all property owners, as required by law.

READ, AND APPROVED, and ADOPTED this the 3rd day of September, 1929.

Approved: T. B. Self, Mayor."

(NOTE: It will be noted that the above Ordinance, No. 38, providing for the Grading—which amounted to about 90 per cent of the cost thereof—of said Jackson Boulevard, or street, was adopted by said City of Tarrant on September 3, 1929; and which also provided therein that the cost of the GRADING thereof, as well as all other expense of said improvements, shall be assessed against the "abutting lots or parcels of property"; said Ordinance clearly impairs the obligation of the contract made in July 7th, 1924, whereby said City acquired the right of way, or easement for said Jackson Boulevard through appellants' property,

and in which said contract or deed one of the main elements of the consideration agreed to be paid for said right of way, was that said City would GRADE said street at its expense and without any expense to the grantor. A copy of the deed or agreement conveying said right of way follows herewith for easy comparison.)

EXHIBIT "C"

Agreement or Deed of Conveyance from Mrs. N. J. Finley to the City of Tarrant City. (Dated July 7, 1924.)

(Exhibit "D", (Tr. p. 53)

"STATE OF ALABAMA,
JEFFERSON COUNTY:

THIS AGREEMENT made and entered into this the 7th day of July, 1924, by and between N. J. Finley and W. N. Finley, hereinafter called vendors and the Town of Tarrant City, Alabama, a municipal corporation, hereinafter called the Town,

WITNESSETH: The Town desires to secure for the purposes of a Public street the real estate hereinafter described and Vendors desire to assent thereto as hereinafter set forth;

NOW, THEREFORE, in consideration of the premises and in further consideration of the matters hereinafter set forth, the said N. J. Finley and her husband, W. N. Finley, do hereby grant, bargain, sell and convey unto the said Town of Tarrant City, Alabama, to be used as a public street, two strips of real estate described as follows, namely:

A fifteen foot strip of land on each side of and adjoining the Birmingham Electric Company's right of way from the South line of Thomason avenue Southward approximately Eight Hundred Seventy-seven (877) FEET to the property line of Sam Cargo,—situated in Tarrant City, Jefferson County, Alabama; *said strips of land are to include sidewalks.*

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To Have and to Hold unto said Town, its successors, and assigns forever.

As a part of the consideration hereof, it is understood and agreed that the Town shall at its own expense, and without expense to Vendors remove the wire fence now standing upon said strips of land and place them along the property line, the posts for said fence to be oak or cedar, placed along said property line approximately eight feet apart with four strands of wire put upon them in such a manner as to make the same a substantial fence in its new position; and that while said fence is being removed from its present position to said property line, the Town shall see to it that the cattle in the enclosure provided by the present wire fence shall not be permitted to leave said enclosure but shall be kept within said enclosure by said Town during all the time said Town is engaged in the work of constructing said fence along said property line as aforesaid.

It is further understood and agreed that the Town shall construct at its own expense, and without expense to Vendors a retaining wall of cement along that portion of said property line on the East side of the right of way of the Birmingham Electric Company, and opposite to a certain spring located near Brannon Station and that said retaining wall shall be of sufficient height and length as will protect said spring from dirt and water coming from or over-flowing from said street.

It is further understood and agreed that the Town shall grade both sides of said strips of land within a reasonable time, making the same reasonably suitable for the use of the public as a street.

As a part of the consideration thereof, it is further understood and agreed that Vendors do hereby release the Town from all damages which may accrue by reason of the laying out and opening of said street.

In Witness Whereof Vendors have hereunto set their hands and seals and the said Town of Tarrant City, Alabama, has caused its name to be affixed hereto by the Mayor of said Town, the corporate seal of said Town to

be hereto affixed and the execution hereof by said Mayor attested by the Town Clerk on this the 7th day of July, 1924.

Mrs. N. J. Finley (L.S.)
W. N. Finley (L.S.)
Town of Tarrant City,
By G. W. Thomason,
Mayor.

Attest: S. H. Bowers.

EXHIBIT "G"

(Copy of Affidavit of Wallace Wells, former Clerk of Tarrant City, Ala.) (Exhibit B, Page 51 Tr.)

State of Alabama,
County of Jefferson:

Before me the undersigned authority in and for said County in said State, personally appeared Wallace Wells, who is known to me, and who after being duly sworn deposes and saith as follows:

My name is Wallace Wells. I reside in Tarrant City, Ala. and have resided there for several years. I was Town Clerk of the said City of Tarrant City during the tenure of office of Hon. T. B. Self as Mayor during the year 1930 and sometime prior thereto and until he went out of office. I am familiar with the papers that were filed into said office while I was Clerk of said Town, and I know of my own knowledge that all of the public Improvements for paving the streets and sidewalks along, by and through the real property owned by Mrs. N. J. Finley and her husband, Dr. W. M. Finley, both of whom are now deceased, and which said property is situated in the town of Tarrant City and which said paving assessments were in favor of said town of Tarrant City, were filed in my office for appeal to the Circuit Court of Jefferson County, Ala. by the said Mrs. N. J. Finley and her husband, Dr. W. M. Finley, and I know that the bonds for said appeals were approved

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by the Mayor at that time, Hon. T. B. Self. Said papers were properly filed and left in the office of said town of Tarrant City, Ala. and attention and notice that said papers (Appeals) were made known to the then City Attorney, Hon. N. A. Graham. After vacating said office I had no occasion to know of said appeals.

My best recollection is that there were 31 appeals and that an appeal bond was filed in each case.

(Signed) WALLACE WELLS.

Subscribed and sworn to before me this the 1st day of August, 1935.

(Signed) A. M. REEVES,
Notary Public.

EXHIBIT "B"

IMPROVEMENT ORDINANCE No. 12, (which provided for improvements on Elm Avenue, in Tarrant City)

(Exhibit 4, page 85 Tr.)

"An Ordinance to provide for certain improvements on First Ave. (or County Road) from the Southeast curb line of Pinson Street to the Northwest right of way line of the Birmingham Waterworks Canal.

BE IT ORDAINED by the Town Council of the Town of Tarrant City, Alabama, as follows:

Section 1: That First Avenue (or County Road) from the Southeast curb line of Pinson Street to the Northwest right of way line of the Birmingham Waterworks Canal shall be graded.

That the roadway, for a width of 15 feet on each side of the center line of First Avenue or (County Road) from the Southeast curb line of Pinson Street to a point 151.6 feet S. E. of S. E. property line of Pinson St. shall be paved with Portland cement concrete pavement 7 inches thick with integral curb 6 inches thick and 7 inches high; that the roadway, for a width of 11 feet on each side

of the center line of First Avenue or (County Road), from a point 290.8 feet Southeast of the SE property line of Pinson St. to a point 1079.7 feet Southeast of the SE property line of Pinson St. shall be paved with Portland cement concrete pavement 7 inches thick with integral curb 6 inches thick and 7 inches high; that the pavement on First Avenue or (County Road), from a point 151.6 feet SE of the SE property line of Pinson St. shall be connected with the pavement at a point 290.8 feet SE of the SE property line of Pinson St. with Portland cement concrete pavement 7 inches thick with integral curb 6 inches thick and 7 inches high; that the roadway, for a width of 10.5 feet on each side of the center line of First Avenue or (County Road) from a point 1197.1 feet Southeast of the SE property line of Pinson St. to the Northwest right of way line of the Birmingham Waterworks Canal shall be paved with Portland cement concrete pavement 7 inches thick with integral curb 6 inches and 7 inches high; that the pavement on said avenue or (Road) from a point 1079.7 feet SE of the SE property line of Pinson St. shall be connected with the pavement at a point 1197.1 feet SE of the SE property line of Pinson St. with Portland Cement concrete pavement 7 inches thick with integral curb 6 inches thick and 7 inches high.

That the area within the intersection of the roadway of Pinson and Jackson Streets with First avenue or (County Road) shall be paved with Portland cement concrete pavement 7 inches thick with integral curb 6 inches thick and 7 inches high.

1. That the sidewalks on both sides of First avenue or (County Road) from the SE property line of Pinson St. to the first alley SE of Pinson St. shall be paved from the property line to the curb lines with Portland cement concrete pavement 4 inches thick; that the sidewalks on both sides of First Avenue or (County Road) from the first alley SE of Pinson St. to a point 1097.7 feet SE of the SE property line of Pinson St. shall be paved for a width of 4 feet and a depth of 4 inches with Portland Cement concrete pavement; that the sidewalk on the west side of First Avenue from a point 1097.7 feet SE of the SE property

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line of Pinson St. to the Northwest right of WAY line of the Birmingham Waterworks Canal, shall be paved with Portland cement concrete pavement 4 feet wide and 4 inches thick.

That the alleyways between said points of said improvements shall be paved with Portland cement concrete pavement 7 inches thick and the driveways into lots shall be paved with Portland cement concrete pavement 6 inches thick.

That stone headers shall be set in in concrete across the roadway of Jackson St., along the Northeast and Southwest property lines of First avenue or (County Road) and across the roadway of First avenue or (County Road) along the Southwest right of way line of the Birmingham Waterworks Canal.

That vitrified clay or concrete drainage pipes, concrete drainage structures, inlets and manholes of brick with cast iron covers shall be constructed along said avenue or (road) between said points.

Section 2: That said improvement shall be made in accordance with the established grades on file in the office of the City Clerk for said portions of said highways, and according to full details, drawings, plans and specifications and surveys of said work and estimates, which shall be prepared by the engineer, as early as practicable, and placed by him on file in the office of the City Clerk, not later than two weeks prior to the date named in Section 4, of this Ordinance, where property owners who may be affected by said improvements may see and examine the same.

Section 3: That the cost of constructing said improvements less such amount as may be paid, or improvement constructed by Jefferson County, Alabama, shall be assessed against the property abutting on the portion of the highways so improved, provided:

(a) That the cost of improvements at or upon streets, avenues, or alley intersections, shall be assessed against the lots or parcels of land abutting on said highways so intersecting for one-half block in each direction.

(b) That the cost of side-walk improvements on street and avenue corners shall be assessed against the lots or parcels of land abutting on or nearest to said improvements, and the cost of side-walk improvements at the intersection of any alley with a street, avenue or other highway shall be assessed against lots or parcels of land abutting or cornering on the alley at such intersection.

(c) That the cost of improving between the tracks and rails of the tracks and for eighteen inches outside of the outside rails of the tracks, including switches and turnouts, of any steam, electric or other railroad tracks, shall be paved by the owners of such railroad and shall be assessed against and form a lien on such railroad and the property connected therewith, and a fair and just proportion of the cost of drainage improvements shall be assessed against and form a lien on each steam, electric or other railroad track on the highways or rights of way drained by such drains or sewers, and nothing shall be construed to relieve any such railroad of its obligations, in the matter of street improvements.

(d) That no assessment shall exceed the cost of such improvements or the increased value of said property by reason of the special benefits derived from such improvements.

Section 4: That the estimated cost of said improvements is $16,000.00 and that the Town Council of the Town of Tarrant City will meet on the 30th day of August, 1927, in the council chamber of the City Hall of Tarrant City at 7 o'clock P. M. to hear any objections, remonstrances or protests that may be made to said improvements, the manner of making the same or the character of material to be used.

Section 5: That this Ordinance must be published in a newspaper of general circulation, the date of the first publication must not be less than two weeks before the date set for the hearing of any objections, protests or remonstrances that may be made against said improvements, the manner of making the same or the character of material to be used. A copy of said Ordinance shall be also sent

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by registered mail, postage prepaid, to the persons last assessing for City or town taxation, and property which may be assessed for said improvements at their last known addresses, said notices to be so mailed by the Clerk of the Town of Tarrant City not less than twenty days before the meeting of the Town Council provided in the next preceding section.

READ AND APPROVED AND ADOPTED, this the 2nd day of August, 1927.

T. B. SELF,
Mayor.

A true copy:

WALLACE WELLS,
Clerk.

(NOTE: The improvement of Elm avenue under the above Ordinance 12, was done and the assessments made thereunder at the same time the improvements and assessments were made under Ordinance 38 on Jackson Boulevard,—that is 1929-30)

EXHIBIT "D"

(Copy of Deed: Birmingham Electric Co. to City of Tarrant)

CONVEYING ITS RIGHT OF WAY FOR STREET PURPOSES

(EXHIBIT 3, page 79 Tr.)

STATE OF ALABAMA,
JEFFERSON COUNTY:

Recorded Probate Office, Vol. 1956, Page 269

THIS AGREEMENT made and entered into on this the 22nd day of August, 1929, by and between the Birmingham Electric Co., party of the first part and the City of Tarrant City, Alabama, a municipal corporation, party of the second part,

WITNESSETH, THAT WHEREAS, the said Birmingham Electric Co. is the owner of an easement, or right of way for an

electric street railway, on, over, along and across the hereinafter described strip or parcel of land Thirty (30) feet wide and extending in length from the Westerly boundary line of Section 8 Tp. 17, R. 2 West, in a general Northeasterly direction to the Northeasterly boundary line of Sloan avenue at Jackson Street in the City of Tarrant City, in Jefferson County, Alabama; and whereas there has heretofore been dedicated for use for public highway or street purposes, two strips of land, one on either side of said right of way of the said Birmingham Electric Co., and adjacent thereto, each extending in length from the said Westerly boundary line of Section 8, Tp. 17, R. 2 West, in a generally Northeasterly direction to the Northeasterly boundary line of Sloan avenue at Jackson Street in said City; and whereas, the said City of Tarrant City desires to acquire the right to use for street or highway purposes said land Thirty (30) Feet in width, in, over, along and across which said Birmingham Electric Co. has an easement or right of way for an electric railway, so that said strip or parcel of land together with the said two strips of 15 feet each in width adjoining the same shall constitute one public street avenue, or highway 60 feet in width; and whereas, said Birmingham Electric Co. is willing to remise, release, quit-claim and convey to the said City of Tarrant City, for street or highway purposes all its right, title, interest and claim in and to said strip of land 30 feet in width hereinafter described other than an easement for the operation of its electric street railway which it desires expressly to reserve for the consideration and upon the terms and conditions hereinafter set forth;

And, whereas, the said City of Tarrant City is willing to enter into this agreement with the said Birmingham Electric Co. in consideration of such quit-claim and conveyance to it by said Birmingham Electric Co.,

Now, Therefore, in consideration of the premises and of one Dollar by each of the parties to the other in hand paid, receipt whereof is by each hereby acknowledged, and in further consideration of the mutual advantages to the respective parties hereto and of conditions and covenants

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hereinafter contained, the Birmingham Electric Co., a body corporate, agrees to remise, release, quit-claim and convey, and does hereby remise, release, quit-claim and convey unto the said City of Tarrant City, a municipal corporation, solely for use as a street or public highway, all its right, title, interest and claim in or to the following described parcel of land, situated in the City of Tarrant City, in Jefferson County, Alabama, viz.; a strip of land 30 feet in width, being 15 feet on each side of the following described line, to-wit: Beginning at a point on the Western boundary line of Section 8, Tp. 17, R. 2 West, 660.2 feet South of the Northwest corner of said Section, thence run North 42 deg., 13 min., East 7.2 feet; thence run 286 feet, more or less, on a 3 deg. 40 min. curve to the right to a point on the line which was formerly the boundary line between property owned by Tarrant Land Co. and R. B. Lacey in Section 8; thence continue on said 3 deg. 40 min. curve to the right 25 feet, more or less, to the end of said curve; thence run in a straight line 723.08 feet, more or less, to the North boundary line of said Section 8; thence continuing in a straight line 32.5 feet, more or less, to a line which was formerly the boundary line between the property of R. B. Lacey and the property of M. T. Branham, in Section 5, Tp. 17, R. 2 West; thence continue in a straight line 267.8 feet, more or less, to that line which was formerly the boundary line between the property of M. T. Branham and Nannie J. Finley, in said Section 5, Tp. 17, R. 2 West; thence continue in a straight line 645.3 feet; thence on a 2 deg. 52 min. curve to the left 231.4 feet, more or less, to a line which was the East boundary line of the property of said Nannie J. Finley and was formerly the boundary line between the property of the said Nannie J. Finley and the property of Tarrant Land Co.; thence on the same 2 deg. 52 min. curve 141.26 feet, more or less, to the end of the curve, thence in a straight line 318.55 feet, more or less, to the East property line of Sloan avenue in the center of Jackson Street said strip of land hereinabove described being all of that land acquired by the predecessor of

the grantor under and by virtue of the following deeds, namely, viz:

1. Deed from M. T. Branham and wife dated 9th March 1914, and recorded in Volume 797 page 589, in the office of the Probate Judge of Jefferson County, Ala.

2. Deed from R. B. Lacey and wife dated March 9th, 1914 and recorded in Record of Deeds, Vol. 797, page 590 of the aforesaid records.

3. Deed from Tarrant Land Co. dated March 12th, 1916, and recorded in Record of Deeds, Vol. 797, page 591, of the aforesaid records.

4. Deed from E. I. DeNemours Co. dated June 6th, 1918, and recorded in Record of Deeds Vol. 920, page 446.

5. A condemnation Proceeding against Nannie J. Finley and Sam Cargo as set forth in Probate Court Final Records Vol. 16, page 229.

It being the intention of the parties hereto that this conveyance shall and does hereby grant to the said City of Tarrant City all the right, title and interest of the Birmingham Electric Co. in and to that strip of land 30 feet wide used by the said Birmingham Electric Co. for a street railway right of way and extending from the Westerly line of Section 8, Tp. 17, R. 2 West, in a Northeasterly direction to the Northeasterly line of Sloan avenue at Jackson Street in the City of Tarrant City, in Jefferson County, Ala. except, however, and subject to rights reserved by and granted to said Birmingham Electric Co. its successors and assigns, hereinafter set forth;

To Have and to Hold, to the said City of Tarrant City and its successors, forever, solely and exclusively for street purposes reserving unto the Birmingham Electric Co., however, and to its successors and assigns, the perpetual right and easement to construct, maintain and operate a single track electric street railway with the necessary poles and appliances over, along, through and under the said strips of land and subject, however, to all of the rights reserved by and granted to said Birmingham Electric Co. and to the other terms and conditions as hereinafter set forth.

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First: Said Birmingham Electric Co. does, for itself and its successors and assigns, reserve and the said City of Tarrant City does hereby grant, bargain, sell and convey unto the said Birmingham Electric Co. the perpetual easement and right to construct, maintain and operate a single track electric railway in the center of said street, avenue or highway composed of said three strips or parcels of land hereinbefore described with all the necessary turnouts, sidetracks, passing tracks, poles, wires, appurtenances and necessaries for the construction, maintenance and operation of such electric street railway according to approved standards.

Second: That the said Birmingham Electric Co. does hereby reserve to itself, its successors and assigns, and the said City of Tarrant City does hereby grant, bargain, sell and convey to the said Birmingham Electric Co. the perpetual easement and right of erecting, constructing, maintaining and operating poles, wires, brackets, supports, guys, guards, appliances, machinery, devices and operation under, over, along and upon said street or highway and of transmitting, distributing, delivering and selling electric current for light and power purposes and for every other purpose, in, under, along, over or upon said street or highway and whether to consumers or prospective consumers residing within the corporate limits of the said City of Tarrant City or beyond and outside thereof. This reservation by the Birmingham Electric Co. and grant to it by the City of Tarrant City of the easement and right of erection, construction, maintaining and operating electric light and power lines is in addition to the rights, powers, privileges and franchises granted by the Town of Tarrant City to Lee C. Bradley as Receiver of Birmingham Railway Light and Power Company by Ordinance No. 14, adopted by the Town Council of the Town of Tarrant City on the 18th day of July 1921, and the contract entered into by and between the said Town of Tarrant City and the said Lee C. Bradley, as such Receiver pursuant to said Ordinance, and none of the rights, powers, privileges and franchises granted to the said Lee C. Bradley, as such Receiver thereof, to which rights, powers, privileges and fran-

chises the Birmingham Electric Co. has succeeded, or hereby waived or in any manner relinquished, released or impaired.

Third: That the Birmingham Electric Co. its successors and assigns, shall have and hold the rights, powers, privileges and franchises hereby reserved by it and granted to it by the said City of Tarrant City to itself, its successors and assigns forever.

Fourth: That upon request by the City Council of the City of Tarrant City said Birmingham Electric Co. will shift or move its street railway track from its present location to the center of said 60 feet street or highway where said tracks are not now in the center of said 60 foot street or highway, and will depress or elevate said track to the grade of said street or highway as established by Ordinance adopted by the City council of the said City, the cost of so shifting or moving said tracks and of elevating or depressing the same to be borne by the City of Tarrant City, and the said City of Tarrant City hereby agrees to pay such costs to said Birmingham Electric Co. upon rendition by said Birmingham Electric Co. to said City of Tarrant City of a statement of such costs and expenses.

Fifth: That in the event the said City of Tarrant City decides to improve said street or highway by paving the same or portions thereof, the center portion thereof, of the width of 10 feet, in the center of which shall be located the street railway tracks of the Birmingham Electric Co. and that portion thereof within the rails of said tracks where a side track, passing track or turnout is situated, and between such passing tracks and for 29 inches from the outside rail of each of said passing tracks shall not be paved but the pavement shall extend only to the sides of said 10 foot strip in the center of said street or highway, and in that part, or those parts, of said highway or street where a passing track, sidetrack or turnout is situated, only to a point within 29 inches of the outside rail of such passing track, sidetrack or turnout, and there and shall be constructed a concrete curb or wall along the edge of such pavement next to said unpaved strip in the center of said

street or highway, which curb or wall shall extend at least two inches above the surface of such pavement and unpaved strip in the center of said street or highway, which said strip shall be cherted or gravelled so that the surface thereof shall be of approximately the same grade or elevation as the surface of said portion of said street paved with cement concrete pavement or hard surfaced pavement and so that such unpaved strip in the center of said street or highway may be crossed without difficulty by automobiles and other vehicles provided that where said street or highway is crossed or intersected by other streets, avenues or highways the intersection of such street or highway with such other streets, avenues, or highways may be paved if the City so desires, with cement concrete or other hard surfaced paving; and on part of the cost of the cherting or gravelling or improving said ten feet strip in the center of said street, or improving or paving that remainder of said street or highway shall be taxed or assessed against the Birmingham Electric Co., or paid by it, except that where an intersection of said street or highway with some other street, avenues or highways is paved the cost of the pavement of that part of said intersection lying between the rails of said street railway track and for 18 inches on each side thereof, may be assessed against said Birmingham Electric Co. and will be paid by it.

In the event the Birmingham Electric Co. shall be required to pay the cost of improving or paving any portion of said street or highway, which under the terms of this agreement is not to be taxed or assessed against said Birmingham Electric Co., then and in that event the said City of Tarrant City will re-imburse the said Birmingham Electric Co. on demand for any such amounts which it shall have been required to pay.

Sixth: The Birmingham Electric Co. has released to the City of Tarrant City its right, title and interest in and to the right of way hereinabove described only upon the condition that if the land embraced within said right of way shall not be used or shall cease to be used as a public highway, then and in such event such right, title, interest or claim as the said Birmingham Electric Co. has in such right

of way prior to the execution of this instrument shall revert to and be again vested in the said Birmingham Electric Co., its successors and assigns.

Seventh: This agreement shall be binding upon and enure to the benefit of the successors and assigns of the parties as well as to the parties themselves.

In Witness Whereof the Birmingham Electric Co., a body corporate, has caused these presents to be executed for it and in its name and behalf by J. S. Pevear, its President, and to be attested and its corporate seal hereon affixed by J. P. Ross, its secretary, and the City of Tarrant City has caused these presents to be executed for it and in its name and behalf by T. B. Self, its Mayor, and to be attested and its corporate seal hereon affixed by Wallace Wells, its Clerk, each and all of whom are hereunto duly authorized, and done in duplicate and on the day and year first above written.

(Signed) Birmingham Electric Company,
By J. S. Pevear,
Its President.

Attest:
J. P. Ross, Sec. (Corp. Seal.)

City of Tarrant City,
By T. B. Self,
Mayor.

Attest:
Wallace Wells,
City Clerk.

Ack. Peaver, before Ethel Bilbrey, N. P.
Ack. T. B. Self, before W. Cooper Green, N. P.
Filed for Record: Dec. 4, 1929; Vol. 1956, page 269.

J. P. Stiles,
Judge of Probate.

(Note: The following is a copy of the written Protest filed by Mrs. N. J. Finley, objecting to said improvement assessments made under said Ordinances Nos. 38 and 12.)

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EXHIBIT "F"

Protest

To the Mayor and City Council of Tarrant City:

The undersigned, Mrs. N. J. Finley, being the owner of the following real estate, situated on Jackson Boulevard also on Elm avenue in the City of Tarrant City Ala., to wit: Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 of Mrs. N. J. Finley's First Addition to Tarrant City, and also the acreage known as the Finley pasture, bounded on the North by Elm avenue; on the West by the Alley next to G. W. Thomason Place; on the East by Jackson Boulevard; on the South by Cargo Property; also the Spring Lot intersection of Jackson Boulevard and Elm avenue; also the acreage bound on the South by Elm avenue, on the West by Jackson Boulevard; on the North by Thomason avenue, on the East by the Prosch property, files her objections and defenses to the assessments proposed to be levied by you for certain alleged improvements against said lots and parcels of land separately and severally and as grounds therefor sets down and assigns the following, separately and severally:

1. For that said assessments are excessive.

2. For that said assessments do not specially benefit said property to the extent of the amount of said assessment.

3. For that the said property was damaged by said alleged improvements.

4. For that many of said lots will have to be filled in with dirt before they can be used for building purposes.

5. For that under that certain deed of July 7, 1924, conveying the right of way to said City for a public street said City agreed to grade same, or to improve same, at its own expense, and without expense to said property.

6. For that said laws and Ordinances under which said alleged improvements were done are illegal and void.

7. For that said alleged improvements and assessments were not done according to law.

8. For that the moving of said street car line, and the assessments therefor was illegally charged to said property.

9. For that said laws and Ordinances and assessments made thereunder violate the Constitution of Alabama, and also the Constitution of the United States.

(Signed) Mrs. N. J. Finley,
By Geo. D. Finley,
Her agent and Attorney.

(Note: On, to wit: Sept. 23rd, 1930, the date set for the hearing the protests, etc., to said improvement assessments, the protest filed by Mrs. Finley was ignored and overruled. Thereafter within the time allowed by law, she filed 31 separate appeals and bonds, appealing said assessments against her property to the Circuit Court of Jefferson County, Ala. as provided for by law. The City attorney for Tarrant City at that time had agreed on the amount of each bond, and the Mayor of said Town of Tarrant City approved each of said appeals and bonds. About six months after taking and filing said appeals and bonds, Wallace Wells, the then Clerk of said City, wrote Mrs. Finley stating that said appeals had been filed, and wanting to know if she desired to pay them off, as he had only a short time to make transcripts of them and send same to the Circuit Court to be tried before a jury, a jury having been demanded in each of said appeals. No negotiations of settlement were made. The said appeals were never sent up to said Circuit Court, and a jury trial nor any other kind of trial was ever had on them. Mrs. N. J. Finley died in August 1932. Her husband, Dr. W. M. Finley, died in January 1935. In August 1935, several months after the death of the life-tenant, Dr. Finley, said City advertised said property for sale for said assessments. Seeing said advertisement in the newspaper, Geo. D. Finley, attorney, and heir or part owner of said property, together with the other parties complainants in this case, filed a suit in Equity to restrain and enjoin said City from selling said property until a trial on said appeals could be had. The City Had Made No Effort to Collect or Enforce the Collection

OF SAID ASSESSMENTS DURING THE LIFETIME OF MRS N. J. FINLEY, nor during the lifetime of Dr. W. M. Finley,—and only AFTER THE DEATH OF BOTH parents of complainants did said City make any gesture toward collecting same; and that about 5 years after said assessments were made.)

EXHIBIT "E"

(The following is a list and description of the property assessed, the amount thereof, etc. under Ordinances Nos. 12; 38 and S-1, Pro. 542 for Sewer in alley.) (page 50 Tr.)

Assessments under Ordinance No. 12

Pro. 16: Begin at intersection NW property line Finley St. with NE property line Elm avenue; thence NW along said property line Elm avenue 1 ft; thence NE and parallel with NW property line Finley St. 290. 5 ft. thence SE 1 ft. to said property line Finley St. thence SW along said property line Finley St. 290.5 ft. to point of beginning; Mrs. N. J. Finley's 1st Add'n, Estate of Mrs. N. F. Finley, $45.58.

Pro. 17: Lot 1, Mrs. N. J. Finley's 1st Add., Est. of Mrs. N. J. Finley, $306.05;

Pro. 18: Lot 2, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $254.92;

Pro. 19: Lot 3, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $306.84;

Pro. 21: Lot 5, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $15.79;

Pro. 22: Lot 6, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $15.79;

Pro. 23: Lot 7, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $13.46;

Pro. 24: Lot 22, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $7.09;

Pro. 25: Lot 21, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $11.09;

Pro. 26: Lot 20, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $7.09;

Pro. 27: Lot 19, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $3.09;

Pro. 28: —Begin at SW property line Elm avenue with NW property line of Jackson Blvd thence SW along said property line of Jackson Blvd 161.2 ft. thence NW and parallel with SW property line of Elm avenue to SW property line alley G. W. Thomason et als survey; thence NE along said alley line to SW property line of Elm avenue; thence SE along said property line Elm avenue to point of beginning in Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $2,953.79;

Pro. 29: Begin at SE property line of Jackson Blvd. with NE property line Elm Avenue; thence SE along said property line Jackson Blvd 297.2 Ft to N property line alley through Block 3 J. C. and W. N. Prosch survey; thence E along said alley line 351.5 ft. thence NW and parallel with Elm avenue to SE property line Jackson Blvd; thence SW along said property line Jackson Blvd. to point of beginning, in Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $1,647.91;

Pro. 30: Begin at intersection SE property line of Jackson Blvd with SW property line Elm avenue; thence SE along said property line Elm avenue 110.7 ft; thence S 82 deg. 42′ W 57.18 ft. to E. boundary Sam Cargo's 1st Add. thence N along said E boundary said Sam Cargo's 1st Add. to SE property line Jackson Blvd. thence NE along said property line Jackson Blvd. 16.1 ft. to point of beginning, in Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $573.35.

Assessments under Ordinance No. 38:

Pro. 82: Lot 9, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley $561.36;

Pro. 83: Lot 10, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $990.75;

Pro. 84: Lot 11, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $1,406.23;

Pro. 85: Lot 12, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $32.45;

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Pro. 86: Lot 13, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $27.93;

Pro. 87: —Begin at intersection of SE property line Jackson Blvd. with NE property line Elm avenue, thence SE along said NE property line of Elm avenue 150 ft; thence NE and parallel with SE property line of Jackson Blvd to SW property line of Thomason Ave., thence NW along SW property line of Thomason ave., to intersection with SE property line of Jackson Blvd 703 ft. to point of beginning; est. of Mrs. N. J. Finley, $7,717.09;

Pro. 74: Lot 1, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $5.71;

Pro. 75: Lot 2, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $11.10;

Pro. 76: Lot 3, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $1,586.50;

Pro. 78: Lot 5, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $539.62;

Pro. 79: Lot 6, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $539.62;

Pro. 80: Lot 7, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $554.43;

Pro. 81: Lot 8, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $561.35;

Pro. 47: —Begin at the intersection of the SW property line of Elm avenue with NW property line of Jackson Blvd. thence SW along NW property line Jackson Blvd 161.2 ft; thence at right angles NW 140 ft; thence NE and parallel with Jackson Blvd to SW property line of Elm avenue; thence SE along SW property line of Elm avenue to point of beginning; est. of Mrs. N. J. Finley, $1,704.51.

Pro. 48: Begin at the intersection of SW property line Elm avenue with SE property line Jackson Blvd thence SW along SE property line Jackson Blvd 16.1 ft thence SE along NE boundary Lot "C" Sam Cargo 1st Add. 140 ft thence NE at right angles to SW property line of Elm avenue thence NW along SW property line Elm avenue to point of beginning; Est. of Mrs. N. J. Finley, $172.08;

Assessments under Ordinance 8-1, Pro: 542:

Begin at SE corner of Lot 6 of G. W. Thomason's survey; thence SE 15 ft to southside of alley for a point of beginning; thence SE along the west side of County Road to point parallel to alley south of G. W. Thomason's Survey; thence Southwesterly along said parallel line to E line of Sam Cargo's property; thence Northerly along said line to South line of Alley; thence Easterly along said alley to point of beginning; estate of N. J. and W. M. Finley, $377.52.

(NOTE: It will be noticed that only A PART of said property had been platted into lots; and if there had been any DEDICATION of any of it it would have been ONLY THAT PART or the abutting streets on that side of said streets where said lots were platted and designated as "LOT".

The acreage, CERTAINLY was NOT dedicated and the parts of said streets along by said acreage WAS NOT DEDICATED.

EXHIBIT "I"

IN THE CIRCUIT COURT TENTH JUDICIAL CIRCUIT OF ALABAMA, IN EQUITY

No. 39620

GEORGE D. FINLEY, ET ALS., *Complainants,*

vs.

THE CITY OF TARRANT CITY, a Municipal Corporation and Z. D. McCUEN, Clerk of Said Municipality, *Respondents*

Decree on Demurrer to Substitute Bill

THIS CAUSE, coming on to be heard is submitted upon demurrer of respondents to the substitute bill of complaint filed in this cause on the 14th day of June, 1941.

Many issues are sought to be raised by the aforesaid pleadings of complainants, which, in the opinion of the court, are not in this proceeding to be considered. How-

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ever, the court is of the opinion that a case of equitable cognizance is contained therein. A brief statement of such case being:

Complainants are sole heirs at law of one Mrs. N. J. Finley, who died in 1932. It is alleged that Mrs. Finley was the owner and in actual peaceable possession of the real estate subject matter of this suit, which is situated within the corporate limits of the City of Tarrant City; such ownership and possession having existed at the time of her death and for a long time prior thereto. Complainants, since the death of their predecessor in title, are claiming such ownership and the continued peaceable possession thereof.

In 1930 the respondent a municipal corporation, passed certain improvement ordinances and made certain improvements adjacent to or in the vicinity of the property herein involved. It is averred that after publication of notice by the municipal corporation as required by statute, Mrs. Finley duly filed, in writing, protests and defenses with the city Clerk, who through accident, fraud or negligence failed to present same to the city Council upon the hearing.

The assessments were made final against the property, and it is averred that Mrs. Finley duly presented appeal bonds for each separate and several assessment to the Mayor of the municipality as provided by Section 2204 et seq., Code of Alabama 1923, which said bonds were duly approved by that officer.

It is further averred that respondents have failed and refused to send the transcript of the proceeding to the Circuit Court, as provided by Section 2207 of the Code of Alabama 1923.

It is further averred that in 1935, that the municipality advertised the property for sale under and by virtue of the aforesaid assessment and proceeded to sell same; said municipality buying in said property.

The original bill of complaint in this cause was filed on August 12, 1935, and by fiat endorsed thereon the cause was set for hearing upon application for an order or writ, restraining and enjoining the respondent from selling, or offering for sale said property and for the cancellation of any sale that might have been made. This application for

temporary injunction or restraining order was denied by an order made August 14, 1935, by the Honorable Leigh M. Clark, one of the Circuit Judges of the Tenth Judicial Circuit of Alabama, sitting in equity.

The Court is of the opinion that the tendering of the protest or objections, by complainants' predecessor in title to the City Mayor, with the request of the filing thereof, was a sufficient compliance with law in regard to the filing of pleadings or other papers required or allowed by law to be filed;—*Covington Bros. Motor* v. *Robinson*, 194 So. 662; *Falley* v. *Falley*, 50 So. 894; *Phillips* v. *Bean's Admr.*, 38 Ala. 248.

Pretermitting a consideration of a question of filing vel non of the objections and defenses to the assessment, this court is of the opinion that upon the presentation to the Mayor of the municipality of the bonds for appeal and the approval by such officer such effectually removed the cause to the Circuit Court of Jefferson County, Alabama, and deprived the municipality of jurisdiction to entertain or to have further proceeding in regard to such assessment and left only the municipality or its officers the ministerial duty of sending a transcript thereof to the Clerk of the Circuit Court, as required by statute.—*City of Huntsville* v. *Pulley*, 65 So. 405.

The court is further of the opinion that the application for a temporary injunction or restraining order and the decree thereon above referred to, is not res adjudicata as to prevent further proceeding in this cause.

The court is further of the opinion that the grounds of demurrer raising laches are without merit for that the respondent, municipal corporation, cannot fail in its statutory duty in regard to forwarding the transcript to the Circuit Court after perfection of the appeal and then proceed to sell the property involved under its assessment.

It is therefore, Ordered, Adjudged and Decreed by the court that demurrer of respondent to the substitute bill of complaint be and the same is overruled.

Done and Ordered This the 10th day of December, 1941.

(Signed) E. M. Creel,
Circuit Judge, in Equity sitting.

EXHIBIT "G"

IN THE CIRCUIT COURT OF TENTH JUDICIAL CIRCUIT OF ALABAMA, IN EQUITY

No. 39620

GEORGE D. FINLEY, et als., *Complainants,*

vs.

THE CITY OF TARRANT CITY, et als., *Respondents*

Decree on Demurrers to Amended Bill

THIS CAUSE coming on to be heard is submitted for a ruling upon demurrers of respondents to the Bill of Complaint as last amended. The Court having considered and understood the demurrers is of the opinion that they should be sustained except as to that aspect of the bill seeking injunctive relief.

It is therefore,

ORDERED, ADJUDGED AND DECREED by the Court that the demurrers of respondents to the bill of complaint as last amended be and they are hereby sustained and said bill of complaint is hereby dismissed as to each and every aspect of said bill except that aspect seeking injunctive relief to which said aspect said demurrers are hereby overruled.

DONE and ORDERED THIS THE 12th day of November, 1946.

(Signed) E. M. CREEL,
Circuit Judge, in Equity sitting.

EXHIBIT "H"

THE SUPREME COURT OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA, OCTOBER TERM, 1947-48

6 Div. 529

Oct. 16, 1947.

GEORGE D. FINLEY, et als.

vs.

THE CITY OF TARRANT, a Municipal Corporation, et als.

Appeal from Jefferson Circuit Court, in Equity

STAKELY, JUSTICE:

This is an appeal from a decree of the equity court sustaining the demurrer to a bill of complaint, as amended, except as to that aspect of the bill seeking injunctive relief. The decree also dismissed the bill, except as to that aspect of the bill seeking injunctive relief. The original bill of complaint was filed in 1935 by George D. Finley and others (appellants) against The City of Tarrant, a municipal corporation, and Z. D. McCuen, the Clerk of the City of Tarrant (appellees). Among other things, the bill sought to restrain the city from selling certain real estate owned by complainants to satisfy certain improvement assessments thereon.

From time to time the bill was amended. In June, 1941, complainants filed a substitute bill. In December, 1941, the court rendered a decree on demurrer to the substitute bill, declaring that "many issues are sought to be raised by the aforesaid pleadings of complainants, which, in the opinion of the court, are not in this proceeding to be considered." The court, however, declared that "a case of equitable cognizance is contained therein", and overruled the demurrer. The aspect of the bill which the court considered as presenting a case for equitable relief is that part of the bill which seeks to enjoin the sale of the lots and preserve the lots in

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statu quo until the appeals hereinafter referred to, can be tried.

The following is a brief summary of the allegations of the substitute bill. The complainants are the heirs at law of their mother, Mrs. N. J. Finley, who died in August, 1932, and who owned the property involved in the suit. Mrs. N. J. Finley on July 7, 1924, deeded certain strips of land to the city for use as a street, in consideration of which the City agreed to relocate certain fencing on her adjacent property, build a retaining wall to protect the adjacent property and grade the property adjoining the strips so deeded. Thereafter, in 1930, the city did improve the street, but contrary to its agreement it charged the grading and other unlawful expenses against the adjacent property, which was platted into lots. The aforesaid strips of land, together with the land previously acquired from Mrs. Finley, by the Birmingham Electric Company for a right-of-way for street railway purposes and subsequently acquired by the city from that company for street purposes, became Jackson Boulevard.

Ordinance No. 12 provided for grading and paving of the street and laying of sidewalks on the street designated as Jackson Boulevard. Ordinance No. 38 provided for the same character of work on the street designated as Elm Street. Ordinance No. S-1 provided for the construction of certain sanitary sewers.

Assessments were made by the city against the lots adjoining the aforesaid streets and Mrs. N. J. Finley duly protested the assessments, filed her contest and appeal bonds and completed her appeals to the circuit court as provided by law. The city, disregarding these appeals, failed to send up the records to the circuit court as was its duty and some considerable time thereafter proceeded to advertise the lots for sale in satisfaction of the improvements liens.

It is alleged in the substitute bill that Jackson Boulevard is not a public street but belongs to complainants except that portion which was conveyed by Mrs. N. J. Finley to the Birmingham Electric Company for the right-of-way for its street car line many years prior to the doing of the work above

mentioned. It is further alleged in the substitute bill that complainants own twenty feet of the strip of land which the city has designated as Elm Avenue which the city took for the construction of the so-called improvement on Elm Avenue without the consent of Mrs. N. J. Finley and without just compensation.

The bill sought (1) to enjoin the sales and to have declared a discontinuance of the assessment cases because of the failure of the city to comply with its duty and send up the record of appeals, to the circuit court for trial; (2) a mandatory injunction directing the city to send up the record to the circuit court for trial as the law directs; (3) a cancellation of the assessments because of excessive charges imposed with the knowledge and the purpose so to do by the city officials, under a conspiracy to tax Mrs. Finley out of her property; (4) cancellation of the deed from Mrs. Finley to the city and its removal as a cloud upon the title to complainants's property; (5) a perpetual injunction against the city from collecting or attempting to collect the assessments and from securing or attempting to secure possession in any manner of the lots and parcels of land; (6) a prayer for general relief.

The demurrer to the substitute bill which was overruled was contained in the answer. There was no appeal from the ruling on the demurrer to the substitute bill. The answer denied, in substance, among other things, that the streets were not public ways, denied that any part of the same had been taken without consideration and alleged that claims for such, if any, were long barred by laches, the statute of non-claim and the statute of limitations.

On December 14, 1944, a phase of the case came before the Supreme Court of Alabama, which is reported as Ex Parte Finley, Et Als., 246 Ala. 218, 20 So. (2) 98. That case was an original petition of George D. Finley, et als., for mandamus to require E. M. Creel, as judge of the circuit court of Jefferson County, to vacate an order sustaining objections of respondents to answering interrogatories propounded by complainants in case pending in the circuit court of Jefferson County entitled George D. Finley, et als., v. City of Tarrant, et als., and directing the respondent

judge to enter an order requiring defendants to answer the interrogatories. In other words, the complainants in the case now before this court sought to require the city of Tarrant and L. D. McCuen, Clerk of the city of Tarrant, to answer certain interrogatories which the court had refused to require these respondents to answer. This court in denying mandamus in part said:

> "The phase of the bill, and only that, seeking injunctive relief against the foreclosure of the property by the city under the assessment liens pending trial of the appeals from the final assesssments presents a case for equitable cognizance. Injunctive relief will be accorded pending an action at law to preserve the status quo of the property until a final settlement of the rights involved. • • •
>
> "Nevertheless this according of equitable protection to the property pending such litigation is merely to preserve the property until the rights are settled at law and the equity court does not undertake to supplant the action at law or to settle such rights. • • •
>
> "The only relevance of the unanswered interrogatories pertains to that phase of the bill which seeks to declare the ordinance invalid and to vacate the assessments because of alleged improper conduct of the city officials. • • •
>
> "In our view, the sole equity of the bill is to prevent a sale of the property and preserve it and its possessions in status quo until the appeals can be tried, and injunctive relief for this purpose is proper."

After the aforesaid decision by this court the complainants filed an amendment to their substitute bill by adding a number of paragraphs with exhibits attached thereto. As stated, the court sustained the demurrer to the substitute bill as amended and dismissed the bill as to each and every aspect except the aspect seeking injunctive relief to which aspect the demurrers were overruled. The present appeal is from this last mentioned decree.

The amendments to the substitute bill may be summarized as follows. Five paragraphs seek to recover possession of

certain tracts of land from the city of Tarrant. These tracts of land are portions of Elm Avenue, Jackson Boulevard and an alley. Elm Avenue, Jackson Boulevard and the alley are public ways adjoining the lots owned by complainants on which the improvement assessments were made. Five paragraphs seek to recover damages for trespass for unlawful entry upon these lands by the city of Tarrant and one paragraph is for taking the lands without due process. In other words, the lands which are sought to be recovered or in connection with which damages in trespass are sought are not the lands which comprise the lots on which the improvement assessments were made, but are lands now forming the alley or located in public streets on which the lots abut. It is claimed that the lands which now form a part of Elm Avenue and which were taken from Mrs. Finley, were taken without being condemned and without just compensation. It is claimed that the strips of land on the side of Jackson Boulevard were procured from Mrs. Finley by a deed from her to the city but that the provisions of the deed providing for relocation of certain fences, construction of a retaining wall, etc., were not complied with. One paragraph seeks specific performance of the aforesaid provisions in the deed and one paragraph seeks to recover damages for breach of those provisions. The deed was made July 7, 1924. It is claimed that a strip of land forming the center of Jackson Boulevard was acquired from Mrs. N. J. Finley by the Birmingham Electric Company by proceedings condemning the strip as a right-of-way for street railway purposes. It appears that on August 22, 1929, Birmingham Electric Company conveyed its right of way to the city of Tarrant for street or highway purposes. It is claimed that since the Birmingham Electric Company abandoned the right-of-way the title reverted to Mrs. Finley. In its deed to the city of Tarrant the Birmingham Electric Company reserved the right to maintain and operate a street railway over the land with necessary tracks, poles, and so forth.

It is the earnest insistence of appellants that since the equity court assumed jurisdiction for injunctive relief, it should retain the bill for all purposes necessary to a com-

plete determination of all matters involved, though they be purely of a legal nature.

Upon careful consideration we have concluded that this court in its aforesaid opinion in *Ex Parte Finley, Et Als., supra,* decided in principal much of what is here presented. In that case this court held that the only equity of the bill was to prevent a sale of the lots and preserve them and their possession in *statu quo* until the appeals from the improvement assessments could be tried. Of course, that opinion should be considered in the light of the record then before the court, including the decree of the court on the demurrer to the substitute bill, with no appeal therefrom.

We think that the allegations in ejectment, trespass, breach of contract and for specific performance, sought to be set up and advanced in the amendment to the substitute bill, among other things, are too far removed from the rights sought to be established in the substitute bill to admit of the amendment.—*Ex parte Finley supra; Stamey* v. *Fortner,* 230 Ala. 204, 160 So. 116; *Henry* v. *Tennessee Live Stock Co.,* 164 Ala. 376, 50 So. 1029. But there is a claim originally made an issue by the substitute bill and its answer and set forth in paragraph C of the amended bill, with reference to the land in Elm Avenue, which should receive our consideration. It is the claim for taking the land in Elm Avenue without just compensation.

The court in its decree on the demurrer to the substitute bill, as amended, reaffirms the right to injunctive relief. If the city took the property of Mrs. Finley to form part of Elm Avenue without condemnation and the payment of just compensation—there is no suggestion that she gave a deed—and such claim, if any, is not barred by laches, the statute of nonclaim or the statute of limitations, then the court will grant relief in such respect by fixing just compensation therefor, with injunctive relief, if necessary, because under those circumstances, the right to compensation persists.—*Jones* v. *New Orleans & Selma R. R. Co.,* 70 Ala. 227; *Thornton* v. *Sheffield & Birmingham R. R. Co.,* 84 Ala. 109, 4 So. 197, 5 Am. St. Rep. 337; *City of Birmingham* v. *Alabama Home Builders Ass'n,* 231 Ala. 558, 165 So.

817; *City of Birmingham* v. *Smyer*, 230 Ala. 234, 160 So. 764.

We see nothing in the case which should give the complainants any further right of amendment. The case has been before the court a long time.—*Alabama Lime & Stone Co.* v. *Adams*, 222 Ala. 538, 133 So. 580. Claims, which once might have been valid, have become stale from lapse of time as for instance any claim for compensation for land taken in the alley. It is alleged that this land was taken in 1923. Finally, there was no request for amendment before the dismissal.—*Ward* v. *Birmingham Water Works Co.*, 152 Ala. 285, 44 So. 570.

To sum up the situation in conclusion, there are two phases of the case which are not concluded. (1) The lots will be held in statu quo pending the appeals from the assessments thereon. (2) The court will determine the right, if any, to compensation and the amount thereof, if any, for the land in Elm Avenue alleged to have been taken without conveyance or condemnation. The decree of the court is accordingly corrected so as to show that the bill, as amended, is also retained as to this aspect.

Corrected and affirmed.

Gardner, C. J., Foster and Lawson, JJ., concur.

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

6 Div. No. 529

GEORGE D. FINLEY, et als., *Appellants*

vs.

THE CITY OF TARRANT etc., et als., *Appellees*

From Jefferson Circuit Court in Equity
The State of Alabama, City and County of Montgomery.

I, J. Render Thomas, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages numbered from one to 9 inclusive, contain a full, true and correct

copy of the opinion of said Supreme Court in the above stated cause, as the same appears and remains of record and on file in this office.

Witness J. Render Thomas, Clerk of the Supreme Court of Alabama, this the 16th day of October 1947.

(Signed) J. RENDER THOMAS,
Clerk of the Supreme Court of Alabama.

EXHIBIT "K"

STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA, OCTOBER TERM, 1944-45

6 Div. 272—

Ex parte: Geo. D. Finley, et als., Petitioners.

Petition for Mandamus Directed to Hon. E. M. Creel, as Judge, etc.

SIMPSON, JUSTICE:

Mandamus to review an order of the trial court declining to require answer to certain interrogatories propounded by petitioners (complainants) to the City of Tarrant (respondent), in a proceeding in equity at issue on bill and answer. Facts to be elicited by the interrogatories related to the costs and charges entering into certain municipal improvement assessments levied against the lots of appellants by respondent city. Certain of the interrogatories also sought to inquire into the motives of the city officials in adopting the improvement ordinance.

Only those interrogatories germane to the equities as disclosed by the bill are required to be answered.—*Altman* v. *Barrett*, 234 Ala. 234, 237, 174, So. 293.

A summary of the pertinent phases of the bill is: Mrs. Finley, appellants' mother (now deceased and from whom appellants inherited the property) deeded a certain strip of land to said city for use as a street, in consideration for which the city agreed to relocate certain fences on her ad-

jacent property, build a retaining wall to protect the lots where the street was to be constructed and grade the property adjoining the deeded strip. Thereafter the municipality did improve the street, but, (allegedly) contrary to its agreement, charged the grading and other unlawful expenses against the property. Appellants' mother duly protested the assessments, filed her contest and appeal bonds and completed her appeal to the circuit court as provided by law. The municipality disregarded these appeals, failed to send up the records to the circuit court, as was its duty, and some considerable time thereafter proceeded to advertise the property for sale in satisfaction of the improvement liens. The bill as last amended sought (alternatively) (1) to enjoin the sales and to have declared a discontinuance of the assessment cases because of the failure of the municipality to comply with its duty and send up the record of appeals to the circuit court for trial; (2) a mandatory injunction directing the city to send up the record of the appeals to the circuit court for trial as the law directs; (3) a cancellation of the assessments because of excessive charges imposed with the knowledge and the purpose so to do by the city officials, under a conspiracy to "tax Mrs. Finley out of her property," and; (4) a cancellation of the deed from Mrs. Finley to the city for failure of consideration.

The phase of the bill, and only that, seeking injunctive relief against the foreclosure of the property by the city under the assessment liens pending trial of the appeals from the final assessments presents a case for equitable cognizance. Injunctive relief will be accorded pending an action at law to preserve the status quo of the property until a final settlement of the rights involved (32 C. J. 124, § 162), to prevent irreparable injury.—32 C. J. 127, § 169; 32 C. J. 128, § 170; *Driver* v. *New*, 175 Ala. 655, 57 So. 437; *Mobile & Birmingham R. Co.* v. *L. & N. R. Co.*, 190 Ala. 417, 67 So. 244.

Nevertheless, this according to equitable protection to the property pending such litigation is merely to preserve the property until the rights are settled at law and the equity

court does not undertake to supplant the action at law or to settle such rights.—32 C. J. 124, § 162.

A prevailing exception to this last stated principle, that equity will not interfere to determine the rights of the litigants at law, is where there is a purely equitable defense unavailable at law precluding the law court from accomplishing complete and efficient justice.—*Boone* v. *Byrd*, 201 Ala. 562, 78 So. 958. The case here presented, however, is without this exception. The matters prayed for are either irremediable in any court or will be fully available as defenses when the appealed cases are tried in the circuit court.

The only relevancy of the unanswered interrogatories pertain to that phase of the bill which seeks to declare the ordinance invalid and to vacate the assessments because of alleged improper conduct of the city officials. The general rule, and controlling here, is that the courts will not institute an inquiry into the motives of the legislative department in determining the validity of ordinances enacted by them for local improvements.—*Cramton* v. *Montgomery*, 171 Ala. 478, 482, 55 So. 122; 32 A. L. R. 1524; 37 Am. Jur. p. 821, § 182. This is because, in making such law, the municipal council is exercising a legislative function and its authorized legislative acts are not subject to impeachment because of bad faith or improper motives.—*Cramton Case, supra; Albes* v. *So. Ry. Co.*, 164 Ala. 356, 365, 51 So. 327; *Clements* v. *Birmingham*, 215 Ala. 59, 61, 109 So. 158; *Talladega* v. *Jackson Lumber Co.*, 209 Ala. 106, 110 95 So. 455.

The rule is different when the city acts in an administrative or proprietary capacity, in which case its acts may be open to inquiry or impeachment for bad faith, fraud or improper motives.—*Pilcher* v. *City of Dothan*, 207 Ala. 421, 93 So. 16; *Van Antwerp* v. *Mobile*, 217 Ala. 201, 206 115 So. 239. This latter principle would be applicable to the present case if, in the execution and accomplishment of the purposes of the ordinance, the officials had so acted and included illegal and improper charges against Mrs. Finley's property in making the assessments. In such case, however,

the remedy at law is entirely adequate to redress the injury and afford relief.

Although not necessary to the present decision, it is observed that no case is made by the bill to authorize equity to cancel the deed of Mrs. Finley to the city for failure of consideration.—26 C. J. S. 195, § 21.

Nor will equity interfere with the cases at law to declare a discontinuance thereof because of the alleged failure of the clerk of the municipality to comply with the statute relative to the appeals from the final assessments. This defense likewise will be available when the cases come on for trial on appeal in the circuit court. The resolution of the municipal council making the assessments final is "a final judgment which can be reviewed only by an appeal seasonably taken therefrom in accordance with the provisions * * * of the Code * * *. A court of chancery can review such judgment only upon the exhibition of some distinct and recognized ground for equitable interference with judgments at law."—*Brock* v. *Decatur*, 185 Ala. 146, 148, 64 So. 73.

No such ground is specified in the bill. Equity is entirely unauthorized to undertake a cancellation of the assessments as for a discontinuance because of the failure of the city clerk to do his duty with respect to transmitting the transcript of the proceedings to the circuit court. Upon posting the appeal bonds and their approval by the proper officer (the statute regarding the presenting and filing of objections having been previously complied with) the appeal was effectively taken.—*Jacobs* v. *Goodwater*, 205 Ala. 112, 87 So. 363; *Lewis* v. *Martin*, 210 Ala. 401, 98 So. 635—And when taken the circuit court acquired jurisdiction of the whole matter, thereby divesting the municipality of further control thereof pending final disposition of said cases on appeal.—*Huntsville* v. *Pulley*, 187 Ala. 367, 65 So. 405; *Lewis* v. *Martin, supra; Cox* v. *Birmingham*, 21 Ala. App. 341, 108 So. 622, cert. den. by Sup. Ct.; *Larcher* v. *Scott*, 2 Ala. 40; *S. & N. Ala. R. Co.* v. *Pilgreen*, 62 Ala. 305; *Oklahoma Vinegar Co.* v. *Kaupp*, 136 Ala. 629, 33 So. 868; *Union Mut. Ins. Co.* v. *Robinson*, 216 Ala. 527(3), 113 So. 587; *Paterson Lumber Co.* v. *Ingersoll*, 226 Ala.

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347, 147 So. 140. And, as stated, the plea of the city's discontinuance of the causes is a defense the appellant may avail of in said circuit court upon due trial of the causes, not in equity as is here sought.

The rule of our cases has been that equity is available to challenge the validity of such proceedings for fundamental defects that go to the jurisdiction and render the proceedings void. We know of no case, and have been cited to none, where the principle has been further extended. Following are sustaining authorities.—*Birmingham* v. *Terrell*, 229 Ala. 523, 525, 58 So. 748; *Penton* v. *Brown*, 222 Ala. 155, 161, 131 So. 14; *Jasper Land Co.* v. *Jasper*, 220 Ala. 639, 127 So. 210; *Jasper* v. *Sanders*, 226 Ala. 84, 145 So. 827; *Bessemer* v. *Schanz*, 226 Ala. 573, 148 So. 131; *Walton* v. *Mobile*, 232 Ala. 200, 167 So. 247; *Rudolph* v. *Homewood*, 18 So. 2d 503; *Bessemer* v. *Ratliff*, 240 Ala. 406, 199 So. 838; *Chenault* v. *Russellville*, 233 Ala. 60, 169 So. 706; *Streater* v. *Town Creek*, 234 Ala. 132, 173 So. 853; *Cowan* v. *Florence*, 11 Fed. Sup. 973, 975.

In our view, the sole equity of the bill is to prevent a sale of the property and preserve it and its possession in status quo until the appeals can be tried, and injunctive relief for this purpose is proper.

So considered the case is not one for the issuance of the writ. The unanswered interrogatories relate to the phases of the bill which are without equity and the writ is therefore denied.

Writ denied.

All the Justices concur except Brown, J., who dissents.

Brown, Justice (Dissenting):

If, as alleged in the bill, the City of Birmingham acting through its city clerk through fraud, accident or mistake, without fault of the property-owner, failed to send up the appeals to the circuit court in 1930, when they were filed, the adverse party appealing in that case was denied due process of law, and the city should be enjoined from enforcing said ordinances from which the appeal is taken. This was the effect of the holding in *Jasper Land Co.* v. *City of Jasper*, 220 Ala. 639, 127 So. 210; *City of Bessemer* v.

Ratliff, 240 Ala. 406, 199 So. 838; *Rudulph* v. *City of Homewood et al.*, 245 Ala. 648, 18 So. 2d 563, and other cases.

Courts of equity in Alabama do not grant new trials nor do they supervise courts of law in the administration of justice. Where the jurisdiction of a court of equity is properly invoked, it does not presume to act on the law court itself, but only on the party, and makes its decrees effective by examining the case on the merits and settling the entire controversy according to equity and justice.—*Norwood* v. *Louisville & N. R. Co.*, 149 Ala. 151, 42 So. 683.

It is a familiar principle, well settled in Alabama, that when a court of equity takes jurisdiction for one purpose, it will settle the whole controversy. If the complainants are entitled to relief at all they are entitled to have that relief granted by the circuit court in equity. It is on this ground I differ with my brethren and dissent from the holding in the foregoing opinion.—*Evans* v. *Wilhite*, 176 Ala. 287, 58 So. 262.

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Appendix 29

IN THE

SUPREME COURT OF THE UNITED STATES

Appealed from the Supreme Court of Alabama

OCTOBER TERM, 1947

No. 741

GEORGE D. FINLEY, ET ALS.,
Appellants,

v.

THE CITY OF TARRANT CITY, ET ALS.,
a municipal corporation, et als.,
Appellees.

BRIEF AND ARGUMENT OF APPELLANTS OPPOSING THE MOTION TO DISMISS THE APPEAL

I

OPINIONS OF THE SUPREME COURT OF ALABAMA

Opinions of the Supreme Court of Alabama are reported as follows: *Finley, et als., vs. Tarrant City, et als.,* 32 So. 2d, 806, decided October 16, 1947; re-hearing denied December 18th, 1947.

II

JURISDICTION

Appellants applied to the Chief Justice of the Supreme Court of Alabama for an appeal to the Supreme Court of the United States to review the judgment of said State Supreme Court, rendered by it on October 16, 1947, rehearing denied December 18, 1947, under Section 237(a) of the Judicial Code, as amended (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. A. 344(a), which reads in part as follows: "APPELLATE JURISDICTION OF DECREES OF STATE COURTS: CERTIORARI: a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had . . . where is drawn in question the validity of a . . . statute of any State, on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error (now "appeal,"—January 31, 1928, c. 14, Sec. 1, 45 Stat. 54"). Said order allowing said appeal was entered on March 11, 1948.

III

STATEMENT OF CASE

(When this brief was printed *no printed record* (only the transcript) in said cause was available. We have been as definite as possible in our references.)

On August 12, 1935, George D. Finley, Hattie Finley, Alta Finley, and Frances Finley, appellants, filed their suit in the equity division of the Circuit Court of Jeffer-

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son County, Alabama, against the City of Tarrant, a municipal corporation, and Z. D. McCuen, Clerk of said City, appellees, seeking, as pertinent to this appeal (Motion to Dismiss), (a) an injunction to restrain said City from selling certain real estate owned by appellants to satisfy certain improvement assessments made on two separate streets passing through said property, *until* certain appeals from said assessments theretofore PERFECTED BY APPELLANTS to the Circuit Court of Jefferson County, Alabama, each providing for a "trial by jury," could be tried; (b) the recovery of certain strips of land belonging to appellants or reasonable compensation therefor, which said city took without a deed or condemnation proceeding to enlarge, or form Jackson Boulevard, Elm Avenue, and a strip of land (15 ft. wide and 366 ft. long) said City "took" to form an "alley"; (c) damages for "changing the grade" in Elm Avenue, and also Jackson Boulevard, whereby ingress and egress from appellants' adjacent lands to said streets is impracticable (which the Supreme Court has ruled to be a "taking without due process of law"); (d) a declaratory judgment holding that said ordinances Nos. 12, 38, and S-1, and the assessments made thereunder are illegal and void, and repugnant to the Constitution of the United States, namely: Section 1 of the 14th Amendment of the Constitution of the United States, which prohibits the City from passing any ordinance which deprives appellants of their property without due process of law, or denying them the equal protection of the law; and Section 10 of Article 1 of said United States Constitution, which prevents said City from passing any ordinance which IMPAIRS THE OBLIGATIONS OF ITS CONTRACT made by it prior thereto with Mrs. N. J. Finley, mother and ancestor of

appellants, July 7th, 1924; wherein said City agreed, in consideration for a certain strip of land for a street now known as Jackson Boulevard, said City would GRADE SAID STREET AT ITS EXPENSE and without expense to appellants (which said GRADING WAS ABOUT 95 per cent of the cost of the improvement thereon), and also to REBUILD CERTAIN FENCING which said City destroyed in the building of said street, and to build a sufficient retaining wall to protect a certain spring on said property adjacent to said street,—(None of Which Was Done By Said City—until 1929-30, when ONLY the grading was done,—and WHEN THAT WAS DONE, said City by ordinance No. 38, under which said improvements on said Jackson Boulevard were made, PROVIDED THEREIN THAT THE ENTIRE COST OF SAID IMPROVEMENT ON SAID STREET THROUGH SAID PROPERTY including THE GRADING would be assessed against the abutting property of appellants, THEREBY IMPAIRING THE OBLIGATIONS OF THE CONTRACT made July 7th, 1924; (e) recovery of a strip of land 30 ft. wide and 877 ft. long, which had been acquired by the Birmingham Electric Co., for a right of way for a STREET CAR LINE—AND NO OTHER PURPOSE—in a condemnation proceeding in 1916 against said Mrs. N. J. Finley, mother of appellants, and which right-of-way REVERTED TO THE ESTATE OF APPELLANTS when said Birmingham Electric Co. SOLD AND CONVEYED ITS SAID RIGHT OF WAY (or a portion thereof) to said City FOR STREET PURPOSES (a different purpose THAN RAILWAY USES) in 1929, just prior to the adoption of said Ordinance No. 38, AND WHICH TITLE TO SAID STRIP OF LAND SAID CITY

HAS NEVER ACQUIRED THERETO FROM APPELLANTS; (f) a cancellation of said assessments made under said UNCONSTITUTIONAL ORDINANCES,—and the EXCESSIVENESS of said assessments, EVEN WERE SAID ORDINANCES IN ANY WAY LEGAL,—said excessiveness being due in part to the inclusion of illegal items therein, such as the adding thereto of the cost of the REMOVAL OF SAID CAR TRACK IN SAID STREET FOR SAID BIRMINGHAM ELECTRIC CO., and also the COST OF GRADING ITS SAID RIGHT OF WAY THRU SAID PROPERTY, and then adding AS AN ADDED BURDEN ON APPELLANTS ALL OF SAID COSTS (which under the laws of Alabama (see Code 1940, Sec. 528 Tit. 37, Appendix, p. 29) such railroads are required to pay their share of) said costs being in the sum of $5,000.00 or more; that said excessiveness of said assessments thus made up, was a "taking" of appellants property without due process of law, in violation of Sec. 1 of the 14th Amendment to the Constitution of the United States.

It is claimed by appellants that if the said right of way of said Birmingham Electric Co., did NOT pass to said City in its said conveyance of 1929 to said City,—then all of the cost of said improvement made by said City on said right of way SHOULD HAVE BEEN CHARGED TO AND PAID BY SAID BIRMINGHAM ELECTRIC CO., as the statutes provide (see appendix, p. 29); IF said title to ANY PART of said right of way passed in said conveyance to said City,—THEN whatever portion of said right of way passed or attempted to pass to said City, did NOT PASS, but said PORTION REVERTED to appellants' estate, and they own same, and said City

NOT HAVING ACQUIRED ANY TITLE FROM APPELLANTS is a trespasser thereon, and NOT having gotten title thereto, its said Ordinances were invalid, and they had *no jurisdiction to improve said streets.*

The complaint, and amendments thereto, filed by appellants in the lower state court contained several *paragraphs or counts, in which various strips of land,* which had been "taken" by said City to enlarge or form said two streets and said "alley" were sought to be recovered, or the reasonable value thereof. In its decree on the demurrer to said bill and amendments, the lower state court sustained the demurrer of appellees AND DISMISSED SAID BILL as to *all said phases or paragraphs,* except that which sought injunctive relief. Said case on demurrer was submitted by agreement, without oral argument, and said DISMISSAL was contained in the SAME RULING on the Demurrer; and appellants were not given any chance for any amendment, and no chance to REQUEST AN AMENDMENT. Said Dismissal being a final decree as to those counts or phases that were DEMURRED TO AND DISMISSED.

The appellants duly filed and perfected their appeal to the Supreme Court of Alabama, to review said lower state court. In its judgment, the Supreme Court of Alabama "CORRECTED and AFFIRMED" the lower state court as follows: It ruled that appellants were entitled to the injunctive relief to prevent the sale by said City of said property UNTIL SAID APPEALS FORMERLY TAKEN could be tried,—and also it ruled that appellants were entitled to recover reasonable compensation for land taken by said City to widen Elm Avenue through said property, BUT denied appellants all other relief. The ef-

fect of said RULING in its said final decree by the Supreme Court of Alabama unless modified or reversed PREVENTS appellants from recovering the two strips of land in Jackson Boulevard,—one 30 ft. by 877 ft. strip that REVERTED when the Birmingham Electric Co. SOLD ITS SAID RIGHT OF WAY TO SAID CITY; the other, is the 30 ft. by 877 ft. strip that said City "took" under an agreement to GRADE AND IMPROVE AT ITS EXPENSE AS THE CONSIDERATION THEREFOR,—and never did, but charged same to appellants; the other strip of land is the "'alley" said City "took" without deed for an Alleyway thru said property, —a strip of land 15 ft. by 366 ft.

All of said strips of land were sued for in the Original Bill, in the amendments thereto, in the substitute bill; and in the amendment to said substitute bill, said property was more particularly described and sued for.

MANNER IN WHICH FEDERAL QUESTIONS WERE RAISED

The Federal questions were raised at the outset; first, in the "Protest, Objections and Defenses" filed in 1930 in the office of the Clerk of said City (T. 141); also in the original bill filed August 12, 1935 (Tr. 5); also in the substitute bill, filed in 1941 (Tr. 46, 47); also in amendment to substitute bill (Tr. 67, par. E); (Tr. 68, par. F; Tr. 69, par. I; Tr. 70, par. K; Tr. 71, par. L; Tr. 70, par. N; Tr. 74, par. Q, 1, 2, 3) and also in the Assignment of Error filed on appeal from the lower State Court. The PROTEST, THE PLEADINGS AND ALSO THE ASSIGNMENTS OF ERRORS, each and all, alleged that said ordinances were illegal, null and void, and un-

constitutional under the due process clauses of the Constitution of Alabama and ALSO under the Constitution of the United States, Section 1, 14th Amendment, and Section 10 of Article 1 of the Constitution of the United States, which prevents said City from impairing the obligations of its contract made July 7, 1924, by it and appellants' mother, by said Ordinance No. 38 of said City, adopted by it in 1929.

PRINCIPLES AND PROPOSITIONS

1. The judgment of the Supreme Court of Alabama was a *final decree* insofar as it sustained the decree of the lower state court in sustaining the demurrers to the Bill of Complaint, as amended, and in *dismissing* it as to certain portions of relief therein sought.

Code of Alabama, 1490, Sections 754, 755.

Ex Parte, Elyton Land Co., 104 Ala., 88, 15 So. 939.

Carter v. Carter, 225 Ala. 287, 142 So. 514.

Pollack v. Stouts Mountain, etc., Coal Co., 184 Ala. 331, 63 So. 531.

Moorer v. Chastain, 247 Ala. 676, 26 So. 2d, 75.

Box. v. Box 247 Ala. 291, 24 So. 2d, 28.

Wynn v. Tallapoosa County Bank, 168 Ala. 469, 53 So. 228.

South, etc., R. Co., v. Highland Ave., etc., R. Co., 104 Ala. 233, 16 So. 112.

Brush Electric Co. v. Electric Impr. Co., 51 Fed. 557, 2 C. C. A. 373.

Mutual Reserve Fund L. Ins. Ass'n v. Smith, 169 Ill. 264, 48 N. E. 208.

Thompson v. Murphy, 93 Fed. 2d, 38.

Moreno v. United States, 120 Fed. 2d, 128.

Galloway v. Gen'l Motors Accept. Corp., 106 Fed. 2d, 466.

Washington v. Beeman, 91 Fed. 232.

Collins v. Metro-Goldwyn Pict. Corp., 106 Fed. 2d, 83.

2. The judgment of the Supreme Court of Alabama (being the court of last resort in Alabama) is a final judgment on the matters ruled on by it; and unless it is modified or reversed, appellants will be deprived of certain property and rights guaranteed to them by the Constitution of the United States, sought in said suit.

Constitution of Alabama, 1901, Art. 6, Section 140.

Worthington v. Worthington, 215 Ala. 447, 111 So. 224.

Ex parte Bibb, 44 Ala. 140.

Pollack v. Stouts Mountain, etc., Coal Co., 184 Ala. 331, 63 So. 531.

Dinsmore v. J. H. Calvin & Co., 216 Ala. 503, 113 So. 522.

Dudley v. Whatley, 245 Ala. 202, 16 So. 2d, 192.

Matthews v. Matthews, 247 Ala. 472, 25 So. 2d, 259.

3. The judgment appealed from determined the validity of the municipal ordinances with respect to their repugnancy to the Constitution of the United States.

(See *Finley, et als., v. City of Tarrant, et als.*, reported in 32 So. 2d, 806, second paragraph of opinion, page 809, where the Supreme Court quoted from Ex parte Finley, 246 Ala. 218, 20 So. 2d, 98—a mandamus proceeding.)

(A) *Whether question* of a defendant's *constitional rights* was adequately *presented and decided in state court* is *itself a Federal* question."

Lovell v. City of Griffin, Ga., 303 U. S. 444, 58 S. Ct. 666, 82 L. ed. 949.

Broad River Power Co. v. State of S. C. ex rel, Daniel, 281 U. S. 537, 50 S. Ct. 401, 74 L. ed. 1023.

(B) When the decision in State Court involves Federal and Local question, the Supreme Court of the United States will take it to review.

United States vs. Pink, 62 S. Ct. 552.

Fox River Paper Co. v. R. R. Commission of Wisconsin, 47 S. Ct. 669, 274 U. S. 651, 71 L. ed. 1279.

Joines v. Patterson, 47 S. Ct. 706, 274 U. S. 544 71 L. ed. 1194.

First National Bank of Guthrie Center, v. Anderson, 46 S. Ct. 135, 269 U. S. 341, 70 L. ed. 295.

(C) "Where the decision of the State Court *ignores* the *Federal* question to the *point* that it *almost may seem* as if the State Court *intended to prevent* review by the Supreme Court of the United States, by basing its decision upon probably insufficient non-Federal grounds, the Supreme Court has indicated

that in such a case it would review the case, though apparently one never has come before it." *Hughes Fed. Procedure.*

Johnson v. Risk, 137 U. S. 300, 11 S. Ct. 111, 34, L. ed. 683.

Leathe v. Thomas, 207 U. S. 93, 28 S. Ct. 30, 52 L. ed. 118.

4. The judgment appealed from is a decision in favor of the validity of the ordinances alleged to be repugnant to the Constitution of the United States.

(See opinion, *Finley, et als. v. City of Tarrant, et als.*, 32 So. 2d. 806, par. 2, on page 809; also the last par. on page 809; also the first and third pars. on page 810)—And the cases cited under "Principles and Proposition No. 3" herein.

5. The judgment appealed from did dispose of certain portions of the litigation between the parties.

(See opinion, *Finley v. Tarrant City*, 32 So. 2d, 806, par. 2, page 809, and the first and third pars. on page 810)—and see cases cited under "Principles and Propositions No. 3" herein.

6. The judgment appealed from shows on its face that the question of the validity vel non of the ordinances alleged to be unconstitutional was decided.

(See *Finley v. Tarraut City*, 32, So. 2d 806,—and the cases cited under "Principles and Propositions No. 3" herein.)

7. That portion of the right-of-way of the Birmingham Electric Co. (which it acquired in its condemnation

proceedings for use for STREET RAILWAY ONLY) was abandoned by it when it sold same to said City in 1929, for a different purpose, NAMELY, A PUBLIC STREET.

Ala. Power Co. v. Dailey, 31 Ala. App. 44, 18 So. 2d, 142.

20 C. J., p. 1236, Sec. 597.

Strong v. Brooklyn, 68 N. Y. 1.

Penn. v. Platt, 47 Ohio St. 366, 25 N. E. 1028.

Heard v. Brooklyn, 60 N. Y. 242.

The People v. Lawrence, 54 Barb. (N. Y.) 589.

8. Ordinance No. 38, adopted by said City *in 1929* which provided that the costs of the "GRADING" of said Jackson Boulevard, with other items, should be paid by appellants IMPAIRED the contract of *July 7, 1924*, wherein said City had agreed to pay for such GRADING and other expenses.

Constitution of United States, Section 10, Art. 1.

Northern Ohio. T. & L. Co., v. State of Ohio, etc., 38 S. Ct. 196, 245 U. S. 574, 62 L. ed. 481.

Rees v. City of Watertown, 86 U. S. 107, 19 Wall. 107, 22 L. ed. 72.

In re State, etc., on Foreign-Held Bonds, 82 U. S. 300, 15 Wall. 300, 21 L. ed. 179.

9. The said City did not acquire title to said strip of land in said streets (said Jackson Boulevard and said "Alley") by prescription of 20 years user, as is required by the laws of Alabama.

Jackson v. Bohlin, 16 Ala. App. 105, 75 So. 697.

Bellview Cemetery Co. v. McEwers, 174 Ala. 457, 57 So. 375.

Parker v. Fuller, 248 Ala. 457, 28 So. 2d, 207.

10. Where a pleading sets up a right claimed under the laws of the United States, the United States Supreme Court, on review, must determine FOR ITSELF the question of the sufficiency of the allegations, AND IS NOT CONCLUDED BY THE VIEW TAKEN BY THE HIGHEST COURT OF A STATE.

Boyd v. Nebraska, 143 U. S. 135, 36 L. Ed. 103, 12 S. Ct. 375.

Mitchell v. Clarke, 110 U. S. 643, 28 L. ed. 283, 4 S. Ct. 170.

11. Where a right claimed under a Federal law is in question, and the highest court of a state has *sustained a demurrer* to a *pleading* which attempts to assert such right, the United States Supreme Court, on review, will determine FOR ITSELF what particular facts were sufficiently well pleaded to have been admitted by the demurrer.

Covington & L., etc., Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 St. Ct. 198.

Hanley v. Donaghue, 116 U. S. 1, 29 L. ed. 535, 6 S. Ct. 242.

12. Local practice will never be allowed to defeat a plain assertion of a Federal right.

Davis v. Wechsler, 263 U. S. 22, 68 L. ed. 143, 44 S. Ct. 13.

13. The law of the United States CANNOT BE EVADED by the forms of local practice.

Rogers v. Alabama, 192 U. S. 226, 48 L. ed. 417, 24 S. Ct. 257.

Am. R. Expr. Co. v. Levee, 263 U. S. 19, 68 L. ed. 140, 44 S. Ct. 11.

Ward v. Love County, 253 U. S. 21, 64 L. ed. 758, 40 S. Ct. 419.

14. When matters nominally of procedure are actually matters of substance which affect a FEDERAL RIGHT, the decision of the State Court is subject to review.

Centr., Ves. R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 S. Ct. 865, Ann. Cas. 1916B, 252.

New Orleans, etc., R. Co. v. Harris, 247 U. S. 367, 62 L. ed. 1167, 38 S. Ct. 535.

Seaboard, etc., R. Co., v. Renn, 241 U. S. 290, 60 L. ed. 1006, 36 S. Ct. 567.

15. "Where there are two or more counts in a declaration alleging distinctly different causes of action, there may be more than one final judgment on which writs of error may be taken, and the fact that such distinct judgments are contained in the same entry, and that one in favor of the plaintiff on one count has been satisfied, WILL NOT PREVENT his maintaining a writ of error to review ANOTHER IN FAVOR OF THE DEFENDANT on different counts to which DEMURRERS WERE SUSTAINED."

Washington v. Beeman, 91 Fed. 232.

Collins v. Metro-Goldwyn. Pict. Corp., 106 Fed. 2d, 83.

Moreno v. United States, 120 Fed. 2d, 128.

Pollack v. Stouts Mountain, etc., Coal Co., 184 Ala. 331, 63 So. 531.

16. "Where a court of equity has assumed jurisdiction for injunctive relief, it will RETAIN the bill for ALL PURPOSES necessary to a complete determination and settlement of the matters involved, THOUGH THEY BE OF PURELY LEGAL NATURE."

May v. Lowery, 214 Ala. 230, 107 So. 67.

Evans v. Wilhite, 176 Ala. 287, 58 So. 262.

Tyler v. Copham, 245 Ala. 151, 16 So. 2d. 316.

Ala. Home Bldg. & L. Ass'n v. Amos, 233 Ala. 367, 172 So. 102.

BRIEF AND ARGUMENT

Since this hearing is confined to the "Motion to Dismiss the Appeal," the argument will be limited largely to the grounds in said motion, which we shall take up in the order as set forth by appellees.

1. The appellees contend that "the judgment of the Supreme Court of Alabama is an interlocutory decree affirming in part a decree of the trial court sustaining demurrers to an amendment to a Bill of Complaint."

The answer to that is that said decree of said Supreme Court of Alabama is final as to THOSE PORTIONS OR COUNTS of said bill to which demurrers were SUSTAINED AND THE BILL DISMISSED, thereby

eliminating said portions or counts from said suit and denying appellants relief thereunder. *Ex parte, Elyton Land Co.,* 104, Ala. 89, 15 So. 939; *Carter v. Mitchell,* 225 Ala. 257, 142 So. 514; *Pollack v. Stouts Mt. Coal Co.,* 184 Ala. 331, 63 So. 531; *Washington v. Beeman,* 91 Fed. 232; *Collins v. Metro-Goldwyn Pict. Corp.,* 106 Fed. 2d, 83.

2. Appellees' Ground No. 2: "The judgment appealed from is not a final judgment."

The answer to that is that since the Supreme Court of Alabama is the court of last resort in Alabama, wherein ONLY ONE application for re-hearing is allowed, said judgment is final as to those matters ruled on by it in its decision of October 16, 1947, AND REHEARING DENIED DECEMBER 18th, 1947. Article 6, Section 140 of the *Constitution of Alabama,* for 1901 (the latest Constitution of said State), reads in pertinent part as follows: ". . . the Supreme Court shall have appellate jurisdiction only, which shall be co-extensive with the State";— *Pollack v. Stouts Mt. Coal Co.,* 184 Ala. 331, 63 So. 531; *Worthington v. Worthington,* 215 Ala. 447, 111 So. 224. *Rules of Practice* in Supreme Court of Alabama provide in pertinent part as follows: "Rule 38 (41, 42) *Rehearings, Applications; Time for Filing*:—". . . and no second application shall be received or filed in any case . . ." In the instant suit an application for re-hearing was duly filed and denied by the Supreme Court of Alabama on December 18, 1947 (Tr. 102-1), (see Finley v. Tarrant City, 32 So. 2d, 806) which became operative and final on said date, and unless said judgment is modified or reversed appellants will be "shorn" and deprived of their said lands "taken" by said City to widen, enlarge or form

said Jackson Boulevard and said "Alley," as well as other relief sought in said suit.

3. In this Ground No. 3: Appellees contend:—"The judgment appealed from has in no sense determined the validity of any statute or municipal ordinance with respect to its repugnancy to the Constitution, treaties or laws of the United States."

The answer to that is found in the opinion of the Supreme Court of Alabama, in this case, reported in *Finlay v. Tarrant City*, 32 So. 2d, 809, second par., from top of page, which is adopted from decision in *Ex parte Finley*, 246 Ala. 218, 20 So. 2d, 98 (which was a mandamus proceeding), which quoted portion reads, in part, as follows: "The only relevancy of the unanswered interrogatories pertains to that phase of the BILL WHICH SEEKS TO DECLARE THE ORDINANCES INVALID." (Emphasis supplied.) In the case of *New York, ex rel. Bryant v. Zimmerman, et al.*, 278 U. S. 63, 73 L. ed. (adv. 52), 49 S. Ct. 61, we find the following: "There are various ways in which the validiy of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. NO PARTICULAR FORM OF WORDS OR PHRASES is essential, but ONLY that THE CLAIM OF INVALIDITY and the Ground therefor be brought to the ATTENTION OF THE STATE COURT with fair precision and in due time. *And if the record as a whole shows* either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented. (Citing: *Cranwell v. Randall*, 10 Pet. 368, 9 L. Ed. 458; *Neilson v. Lagow*, 12 How. 98, 13 L. ed. 909; and many other cases. Quoting further from

said opinion: "Of course, the decision must have been against the claim of invalidity, BUT IT IS NOT NECESSARY THAT THE RULING SHALL HAVE BEEN PUT IN DIRECT TERMS. IF THE NECESSARY EFFECT OF THE JUDGMENT has been to DENY THE CLAIM, THAT IS ENOUGH." (Citing: *Cranwell v. Randell,* supra; *Chapman v. Goodnow* (Chapman v. Crane), 123 U. S. 540, 31, L. ed. 235, 8 S. Ct. 211; *Bells Gap R. Co., vs. Penn.,* 134 U. S. 232, 33 L. ed. 892, 10 S. Ct. 533; *St. Louis, etc., R. Co. vs. Starbird,* 243 U. S. 601, 61 L. ed. 923, 37 S. Ct. 462."—and other cases.)

In 27 R. C. L., p. 71-72, we find the following: "If a Federal question appears in the record and was decided, or such decision was necessarily involved in the case and the case could not have been determined without deciding such question, the fact THAT IT WAS NOT SPECIALLY SET UP AND CLAIMED is NOT CONCLUSIVELY AGAINST A REVIEW. (Citing: *Passaic River Bridges v. Hoboken, etc., Land Co.,* 1 Wall. 116, 17 U. S. (L. ed.) 571, and many other cases.) . . . *"And in order to determine whether the validity of a statute was drawn in question* it is proper to INSPECT THE PLEADINGS in the cause as well as the judgment of the Court. (Citing: *Craig v. Mo.,* 4 Pet. 410, 7 U. S. (L. ed.) 903.) "This *right to review* and the limitations thereon have been most frequently recognized in cases INVOLVING QUESTIONS OF DUE PROCESS of law (*Davidson v. New Orleans,* 96 U. S. 97, 24 U. S. (L. ed.) 616, and other cases cited), and the validity of statutes on the ground of IMPAIRING CONTRACT RIGHTS. (*Picqua, etc., Bank v. Knoop,* 16 How. 369, 14 U. S. (L. ed.) 977, and other cases cited.)

In the case of *Broad River Power Co. v. S. Car. ex rel, etc., Daniel*, 281 U. S. 537, 74 L. ed. 1023, we find the following: "Whether the state court has denied to rights asserted UNDER LOCAL LAW the protection which the Constitution guarantees, *is a question* upon which the petitioners are ENTITLED TO INVOKE the JUDGMENT OF THIS COURT. EVEN THOUGH THE CONSTITUTIONAL PROTECTION INVOKED BE DENIED ON NON-FEDERAL GROUNDS, it is the province of this court *to inquire* whether the decision RESTS UPON A FAIR OR SUBSTANTIAL BASIS. If *insubstantial*, constitutional obligations MAY NOT BE THUS EVADED. (Citing: *Fox River Paper Co., v. R. R. Co.*, 274 U. S. 651, 71 L. ed. 1279, 47 S. Ct. 669, and other cases.)

In Ground 4, appellees allege: "The judgment appealed from is not a decision in favor of the validity of the ordinances alleged to be repugnant to the Constitution of the United States."

The answer to that is, that the *validity* of the Ordinances was attacked in the pleadings (Tr. 4, par. 7; Tr. 5, par. 12; Tr. 38, par. 3; Tr. 38, par. 2; Tr. 39, par. 4; Tr. 49, par. 6; Tr. 44, par. 12; Tr. 44, par. 13; Tr. 45, par. 15; Sections (b), (c), (d), (f), (i), (j), (m), (n), Tr. 66, par. D; Tr. 67, par. E; Tr. 68, par. F; Tr. 68. par. G; Tr. 69, par. H; Tr. 69, par. I; Tr. 70, par. J; Tr. 71, par. L; Tr. 72, par. M; Tr. 72, par. N; Tr. 73, par. O; Tr. 74, par. P, were attacked on the ground that they were repugnant to the Constitution of the United States. (The reason for so many citations to the pleadings above, is, that the Original Bill, and amendments made, all contained allegations of the *invalidity* of

said Ordinances—even the Protest filed (Tr. 141) attacked the validity of said Ordinances. The said Protest, with its several grounds attacking said Ordinances and assessments, was ADOPTED AND MADE A PART OF THE PLEADINGS AS AN EXHIBIT THERETO (Tr. 39; also Tr., Exhibit F. 141). Also, said Ordinances' validity was attacked in the Assignments of Error to the lower state court (Tr. 102 D) as well as in the briefs filed by appellants in the Supreme Court of Alabama in said cause.)

Thus we see that the Supreme Court of Alabama had before it in said *pleadings*, and in said *assignments of error*, and in said *briefs* of appellants, said attacks made on the validity of said Ordinances. Now, let us examine the opinion ITSELF rendered in said case and see what was CONSIDERED, and decided by the Court. To do this, we will quote certain excerpts from said opinion: (See *Finley v. Tarrant City*, reported in 32 So. 2d, 806: Therein we find the following expressions: "Upon CAREFUL CONSIDERATION WE HAVE CONCLUDED, etc." (emphasis supplied) . . . "one paragraph IS FOR TAKING THE LANDS WITHOUT DUE PROCESS" (par. 5, page 809) . . . "*We see nothing in the case* which should give the complainants ANY FURTHER RIGHT OF AMENDMENT" . . . In the 9th paragraph of said opinion (*Finley v. Tarrant City*, 32 So. 2d, 806) the Court QUOTES from the opinion, *Ex parte Finley*, 246 Ala. 218, 20 So. 2d, 98, a mandamus proceeding by said Finley, in part as follows: "The only RELEVANCY OF THE UNANSWERED interrogatories pertains to that PHASE OF THE BILL WHICH SEEKS TO DECLARE THE ORDINANCES INVALID . . ."

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We see from the above expressions of the Court that IT DID PASS ON THE VALIDITY OF THE ORDINANCES as to their being repugnant to the Constitution of the United States. If the Supreme Court of Alabama IGNORED THE FEDERAL questions raised, we find that this Court has *indicated that it would review the case* (*Johnson v. Risk*, 137 U. S. 300, 11 S. Ct. 111, 34 L. ed. 683; *Leathe v. Thomas*, 207 U. S. 93, 28 S. Ct. 30, 52 L. ed. 118).

In this instant case, both local and Federal questions were raised—in the Pleadings, in the Protest (which was made a part of the bill), and in the Assignment of Errors, and in the Briefs. In the case of *First Nat. Bank v.* Anderson, 46 S. Ct. 135, 269 U. S. 341, 70 L. ed. 295, we find, and quote the following: "In cases coming from STATE COURTS this Court's *power and concern* are *specially* directed to RULINGS MADE OR REFUSED ON FEDERAL QUESTIONS." (Citing: *Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 429, and other cases cited.)

The easement or right-of-way acquired by Birmingham Electric Co. from Mrs. N. J. Finley, in condemnation proceedings in 1916, was clearly abandoned by it when it sold same to said City by its deed of August 22, 1929 (Exhibit D, Tr. 135), and said portion conveyed REVERTED to the estate of appellants. *Ala. Power Co. v. Dailey*, 31 Ala. App. 44, 18 So. 2d, 142; *Strong v. Brooklyn*, 68 N. Y. 1; *Heard v. Brooklyn*, 60 N. Y. 242,—and cases cited under proposition No. 7 herein. An excerpt from said deed reads: "It being the INTENTION of the parties hereto that this conveyance shall and does hereby grant to the said City of Tarrant City *all the right, title*

and interest of the Birmingham Electric Co., IN AND TO SAID STRIP OF LAND, 30 feet wide used by the said Birmingham Electric Co., for a street railway right of way, etc. . . . "reserving the right to operate a SINGLE TRACK RAILWAY on said street (Jackson Boulevard), etc. . . ." (Fifth) paragraph of said Deed: "That in the event the said City of Tarrant City decides to improve said street or highway by PAVING the same or portions thereof, the center portion thereof, of the width of 10 feet, . . . shall NOT be paved . . . but the pavement shall extend only to the sides of said 10-foot strip in the center of said street . . . ". "In the event the Birmingham Electric Co. SHALL BE REQUIRED to pay the cost of improving or paving ANY PORTION OF SAID STREET . . . then in that event the said City of Tarrant City will reimburse the said Birmingham Electric Co., on demand, for any such amounts which it shall have been required to pay." The above said deed or agreement, was made SUBESQUENT TO AND SUBJECT to the deed or agreement made by said City with Mrs. N. J. Finley, July 7th, 1924, which reads in part as follows (Tr. 129, Exhibit C): ". . . as a part of the consideration hereof, it is agreed and understood that the Town shall at ITS OWN EXPENSE AND WITHOUT EXPENSE TO VENDORS remove the wire fence . . . and place same along the property line, etc., etc., . . . It is further understood and agreed that the Town shall construct AT ITS OWN EXPENSE, AND WITHOUT EXPENSE TO VENDORS a retaining Wall of Cement, etc., . . . to protect a certain spring adjacent to said street," etc. . . . "It is further understood and agreed that the Town shall GRADE BOTH SIDES OF SAID STRIPS OF LAND within a reasonable time, etc. . . .".

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The said City complied fully with its agreement WITH SAID BIRMINGHAM ELECTRIC CO., but it DID NOT COMPLY IN ANY PARTICULAR WITH THE DEED OR AGREEMENT IT HAD MADE July 7th, 1924—(a long time PRIOR to said deed from Birmingham Electric Co.)—and it "shifted" the expense of IMPROVING SAID CAR TRACKS onto and included same in the assessments it made against appellants' property,—thereby ADDING AN UNEQUAL AND ADDITIONAL BURDEN to appellants and thereby denying to appellants the equal protection of the law; and thereby "taking" appellants' property without due process of law.

Ordinance No. 38, which was adopted by said City on September 3rd, 1929 (AFTER and SUBJECT TO the Deed of Mrs. N. J. Finley, of July 7, 1924), reads in part as follows (Exhibit A, Tr. 127): "Section 1. That Jackson Street . . . shall be graded . . . That the roadway for a width of 22 feet on each side of the center line of Jackson Street . . . shall be paved with one course Portland cement concrete pavement 7 inches thick with integral curb 6 inches thick. . . . Provided, however, that the area between the tracks and the rails of the tracks and for 29 inches outside of the outside rails of the tracks of the Birmingham Electric Co., on Jackson Street . . . shall not be paved with concrete pavement but shall be macadamized." . . . (Note: All except 10 ft., in center of said street was GRADED AND PAVED BY said City at said time.) Section 3, in part, of said ordinance, reads (Tr. 128, Ex. A): "That the cost of constructing said improvements shall be assessed against the property abutting on the portions of the highways so improved . . .'

We thus see from the above "excerpts" that appellants have been "deprived" of a strip of land 30 ft. wide and 877 ft. long on Jackson Boulevard by said City in that it did NOT COMPLY WITH ITS SAID AGREEMENT of July 7, 1924, and GRADE SAID STREET AT ITS OWN EXPENSE,—but instead CHARGED ALL OF SAME TO APPELLANTS; also appellants were "deprived" of another strip of land on said street 30 ft. wide and 877 ft. long,—the land that was ABANDONED BY SAID BIRMINGHAM ELECTRIC CO., AND which REVERTED TO APPELLANTS WHEN SAME WAS CONVEYED TO SAID CITY BY SAID BIRMINGHAM ELECTRIC CO. True, Birmingham Electric Co. "assumed" that said easement to said City had been dedicated,—but it evidently had NOT read said deed of July 7, 1924, executed by Mrs. N. J. Finley, and said City,—it is said that "even Homer nods" occasionally.

Now, let us see about Elm Avenue, which crosses said Jackson Street, through said lands of appellants. The improvement under each Ordinance—Ordinance No. 38 and Ordinance No. 12—was done at same time practically. From the deed (Tr. 75, 76), we find that said Elm Avenue (formerly known as County Road, also as First Avenue), was only 20 feet wide UNTIL said City graded and paved same; that now (by actual measurement) it is 35 feet wide, and that said City never did acquire a deed to said extra 15 feet from appellants through whose lands same runs. "Assessment certificates issued against abutting property for street improvements prior to the acquirement of the right-of-way for, and the legal establishment of, the street, are void."—*City of Palmetto v. Katsch*, 98 So. 352; *Detroit, etc., Ry. Co. v. Detroit*, 49 Mich. 47, 12

N. W. 904; *Harmon v. City of Omaha,* 53 Nebr. 164, 73 N. W. 671; *City of Mobile v. Smith,* 136 So. 851, 223 Ala. 480.

The first strip of land said City "took" from appellants was the "alley,"—a strip 15 ft. wide and 366 ft. long. It was taken under an Ordinance (which could not be located at the City Hall by counsel for appellants and the present City Clerk). Said Ordinance was adopted in 1923, and provided for the construction of a sewer along and under said alley, which was taken also for public roadway. The appellants were not residing on said lands at said time—it was rented out to a tenant—and they did not know of said "taking" of said alley until some time later, when they filed this suit, which was filed August 12, 1935. In said original bill they sued for all of the property described in Exhibit A, attached thereto, among which was said lands comprising said "alley"; later they claimed it more definitely in later pleadings. There has been no LIMITATIONS OF ACTIONS RUN AGAINST THEIR SAID CLAIM THEREFOR FROM 1923 to 1935; nor even to 1941. It requires 20 years in Alabama to perfect prescription by public user of lands. Likewise, there had been no prescription against appellants as to said strips of land in Jackson Street; they were "taken" in 1929-30 by said City; so, prescription has not run as to said strips of land, nor any of them.

It has been held in numbers of cases, that "An ordinance assessing the ENTIRE COST OF A STREET IMPROVEMENT AGAINST ABUTTING OWNERS WHERE A STREET RAILROAD was by a prior subsisting law required to pave and keep in repair a part of such street, *was void;* and the County Court could

not enter an order eliminating from the estimated cost the portion which the railroad was bound to pay, and then recast and confirm the assessment."—*Am. Hide & Leather Co. v. City of Chicago*, 67 N. E. (Ill.) 979; *City of Alston v. Middleton Heirs*, 158 Ill. 442, 41 N. E. 926; *Smith v. Chicago*, 169 Ill. 257, 48 N. E. 445. It has also been held that ". . . the easement of a Railroad Co., itself is co-extensive ONLY with the use for which it was acquired." —*Stillman v. Chicago, etc., R. Co.*, 78 Iowa 404, 43 N. W. 275, 16 Am. S. R. 452. It is quite clear that appellants are entitled to recover the lands said City took for said "alley"; also for the strip of land that REVERTED to appellants' estate when Birmingham Electric Co. sold its right-of-way to said City; also for the strip of land said City took on Jackson Boulevard (30 ft. by 877 ft.) to enlarge said street, and which said City had agreed in writing on July 7th, 1924, that it would GRADE at its expense, but did not do so, and contrary to its agreement, it charged said costs to appellants. Appellants certainly can depend on the Constitution of the United States to protect them against such illegality and confiscation. This is still supposed to be a civilized country, where dealings and conduct by its citizenry is based on law and order, and not "might." Whenever a citizen gets to where he cannot depend on the Constitution of the United States to protect him in his property, his liberty, etc., he might as well join the disordered elements of the uncivilized world.

In Ground 5, appellees contend: "The judgment appealed from does not dispose of the litigation between the parties."

The answer to that is, that as to those phases said demurrer was substained to, and SAME DISMISSED as parts of said bill, it does dispose of some very important PARTS OF SAID LITIGATION. See cases cited and argument under points 3 and 4 supra.

In Ground 6, appellees contend: "The judgment appealed from shows on its face that the question of the vilidity vel non of the ordinances alleged to be unconstitutional has not been decided."

The answer to that is, that the excerpts quoted hereinabove from said opinion in this case styled *Finley, et als., vs. Tarrant City, et als.*, 32 So. 2d, 806, show that they were decided. The EFFECT of said judgment is very apparent. Were appellants later to seek to recover said strips of land in this case, or any other case, unless said opinion is reversed or modified, appellees would change their tune; they would THEN cite said case to show that it DID and DOES prevent appellants' recovery of said strips of land, and other relief denied them in said judgment.

IN CONCLUSION, appellants submit that this cause has all of the "ingredients" that are required by Section 237(a) of the Judicial Code, as amended, 28 U. S. C. A. 344(a), to give this Honorable Court jurisdiction of this cause; but should there be any doubt in the mind of the Court as to same, appellants move and pray the Court to reserve its opinion thereon until a hearing on the merits.

It is respectfully submitted that said Motion to Dismiss said appeal should be denied, at the costs of the appellees.

GEORGE D. FINLEY, *Attorney,*
Pro Se.

HATTIE FINLEY,
Pro Se.

ALTA FINLEY,
Pro Se.

FRANCES FINLEY,
Pro Se.

CERTIFICATE

We, the undersigned, appellants, certify that we have forwarded copies of the foregoing brief to Messrs. Graham, Bibb, Wingo & Foster, attorneys of record for appellees in the above cause, at their address in Birmingham, Alabama, by mail, postage prepaid, on this the 13th day of April, 1948.

GEORGE D. FINLEY, *Attorney,*
Pro Se.

HATTIE FINLEY,
Pro Se.

ALTA FINLEY,
Pro Se.

FRANCES FINLEY,
Pro Se.

APPENDIX

Code of Alabama, 1940, Tit. 7, Section 754 (6078) *Appeals to Supreme Court on all final Judgments.*—From any final judgment or decree of the circuit court, or courts of like jurisdiction, . . . an appeal lies to the Supreme Court, for the examination thereof as matter of right, on the application of either party, . . ."

Code of Alabama, 1940, Section 755 (6079)—*Appeals from certain interlocutory decrees.*—From any decree rendered by the circuit court in equity cases, sustaining or overruling a demurrer to a bill in equity, . . . an appeal lies from such decree, to be taken within thirty days from the rendition thereof, to the Supreme Court. Such appeal shall be heard and determined by the Supreme Court in preference to all other appeals except appeals in criminal cases; and if the decree is reversed, the court shall render such decree as should have been rendered by the court below; but nothing in this section shall prevent an assignment or errors on such decrees on appeals taken on the final determination of the cause, if no appeal is taken under this section."

(Note: "Where ruling serves to Dismiss Bill.—If the ruling on the demurrer to a bill in equity, DISMISSED the bill, then the decree becomes FINAL and is governed by the next foregoing sections, and an appeal therefrom may be taken within six months from the rendition of judgment or decree.—*Lewis v. Martin*, 210 Ala. 401, 98 So. 635.)

Code Ala., 1940, Tit. 37, Section 528 (Code 1923-28) (2189)—*Assessments as against street car or railroad*

tracks.—If there be a street, electric, or other railroad track or tracks on any street or highway improved or re-improved under this article, *the cost of such improvement,* except storm water and sanitary sewers, between the tracks and the rails of the tracks . . . *shall be paid by the owner of the raliroad,* and *shall be assessed against and form a lien* on said *railroad,* and the property connected therewith . . .".

FILED
APR 12 1948
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 741

GEORGE D. FINLEY, ET ALS.,

Appellants,

vs.

THE CITY OF TARRANT CITY, A MUNICIPAL CORPORATION, ET ALS.,

Appellees.

STATEMENT OF APPELLEE AND MOTION TO DISMISS

Come the Appellees herein and pursuant to Rule 12 (3) of Rules of Supreme Court of United States files with the Clerk of The Supreme Court of Alabama the following statement disclosing matter or grounds making against the jurisdiction of the Supreme Court of United States, asserted by Appellant, and includes herein their motion to dismiss the appeal.

1. The judgment of the Supreme Court of Alabama appeaded from herein is an interlocutory decree affirming in part a decree of the trial court sustaining demurrers to an amendment to a Bill of Complaint.

2. The judgment appealed from is not a final judgment.

3. The judgment appealed from has in no sense determined the validity of any statute or municipal ordinance with respect to its repugnancy to the constitution, treaties or laws of the United States.

4. The judgment appealed from is not a decision in favor of the validity of the Ordinances alleged to be repugnant to the Constitution of the United States.

5. The judgment appealed from does not dispose of the litigation between the parties.

6. The judgment appealed from shows on its face that the question of the validity vel non of the ordinances alleged to be unconstitutional has not been decided.

Now Therefore, Premises Considered the Appellees move the Court to dismiss the appeal filed herein.

DOUGLASS P. WINGO,
Attorney for Appellees.

GRAHAM, BIBB, WINGO & FOSTER,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

Appealed from the Supreme Court of Alabama.

OCTOBER TERM, 1947

No. 741

GEORGE D. FINLEY, et als.,
Appellants.

v.

THE CITY OF TARRANT CITY,
a Municipal Corporation, et als.,
Appellees.

PETITION FOR RE-HEARING

TO THE HONORABLES, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Come the appellants, George D. Finley, Hattie Finley, Alta Finley and Frances Finley and, complaining that error has intervened in the decision of the Court, respectfully apply for a re-hearing in the above-styled cause, and pray that the certificate, order, or mandate of dismissal of the appeal therein be re-called and stayed pending re-hearing of said cause; and in support of said petition for re-hearing appellants submit the following:

BRIEF AND ARGUMENT

The order entered on May 3, 1948, by this Honorable Court is in the following language:

> "PER CURIAM: The motion to dismiss is granted and the appeal is dismissed for the reason that the judgment of the court below is based upon a non-federal ground adequate to support it. Mr. Justice Black took no part in the consideration or decision of this case".

This Honorable Court evidently did not have before it sufficient of the pleadings,—the substitute bill and the amendment thereto—in the *jurisdictional statement* filed along with the brief of the appellants. The main contention of appellants is *that* relative to their rights as to Jackson Boulevard and said "Alley" which the City confiscated from appellants.

Now, let us examine the opinion rendered in said cause by the Supreme Court of Alabama with reference to said Jackson Boulevard and said "Alley". Said opinion is officially reported as *Finley, et als., v. Tarrant City,* ..... Ala., ..., 32 So. 2d, 806. In discussing certain excerpts from said opinion it is pertinent first to consider certain paragraphs of said Substitute Bill and the amendment thereto relating to said Jackson Boulevard and said "Alley". (It might be well to state that the reason for filing the substitute bill was for the purpose of incorporating into one *paper,* so to speak, the Original Bill filed August 12, 1935, and the Amendments thereto; and in open Court, when appellants confessed the demurrer of respondents to the last amendment to the *original bill,*

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counsel for appellants with the approval ot the Court, agreed to and did file, said substitute bill June 14, 1941 (Tr. 56), with the following exhibits, among others, in aid thereof and as a part thereof: Exhibit A, containing a description of said assessments, among which was a description of the land taken by said City to form said "alley" October 2, 1923; and appellants sued for said land taken to form said "alley" in paragraph 2, of said Substitute Bill (Tr. 38), which paragraph reads, in part, as follows: "2. Complainants are the only surviving children and the only heirs of Mrs. N. J. Finley, who died in August 1932, and who for thirty years or more prior to and at her death was the owner of and in actual peaceable possession of the real estate described in Exhibit A hereto annexed and made a part thereof as if fully set out herein * * *" (See Exhibit E, page 44 of the printed "Statement as to Jurisdiction" where said land forming said "alley" is described as S-1, under the sewer Ordinance.

Now there had been no lapse of twenty (20) years between October 2, 1923 when said land to form said "alley" was taken by said City, and June 14, 1941, when said Substitute Bill was filed. "The acquisition of a public road by *prescription* requires twenty (20) years of uninterrupted use by the public."—*Beverly v. State,* 28 Ala. App. 451, 185 So. 768; *Sharp v. State,* 25 Ala. App. 173, 142 So. 683; *Dickson v. Dickson,* 247 Ala. 330, 24 So. 2d 419.

It is therefore, very clear, that the claim of appellants to said land forming said "alley" was NOT lost to them by prescription.

Appellants could disregard the amendment filed to

the substitute bill and still recover said "alley" under said substitute bill. The amendment merely attempted to more clearly state said claim. (See par. L., TR. 71, and Par. 2 of prayer, Tr. 75). It may also be noted that said land taken by said City to form said "alley" was sued for by appellants in their original bill, paragraph 2 thereof, which reads practically the same as paragraph 2 of the substitute bill (Tr. 1). (See also par. 2, Tr. 38, in substitute bill). To the said original bill, par. 2 (Tr. 1) Exhibit A was attached thereto and made a part thereof, which Exhibit described said land, 15 ft. wide and 366 ft. long, taken to form said "alley". Said exhibit was detached therefrom when the Substitute Bill was filed, and was attached to said Substitute Bill. We also find the following allegation in the original bill filed August 12, 1935: "Pr. 12. Complainants further aver that said municipality is attempting to confiscate said property of complainants without due process of law." (Tr. 5). Also, we find in the prayer of said original bill the following language: "Complainants pray for such other, further, general or special relief as in equity they are entitled to and in duty bound will every pray". The same prayer is in substitute bill.

"Where the original complaint was NOT barred by the statute of limitatio, a proper amendment to the original complaint, made AFTER the period of limitations for the actions alleged in the amendment related back to the original complaint and was NOT barred by the statute."—*Townes v. Dallas Mfg. Co.*, 154 Ala. 612, 45 So. 696, and cases cited therein. "Amendment to bills may be filed as a MATTER OF RIGHT at any time before final decree, by striking out or adding new parties, or to meet ANY STATE OF EVIDENCE which will

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authorize relief; * * * (Equity Rule 28(d), Ala. Code for 1940) (1923 Code, Ala., 6558). (Note, Cited: "An amendment to bill in equity does NOT depart from purpose of original bill if it seeks to adjudicate property rights in same property between same parties as result of same transaction, though presenting different version of facts and calling for application of different legal principles and moulding of relief in different form."—*King v. McAnnally,* 234, Ala., 479, 175 So. 546, and cases cited therein.

Therefore, appellants respectfully insist that under the decision rendered in this cause by the Supreme Court of Alabama they have been deprived of their said property taken by said City to form said "alley" without due process of law in violation of Section 1 of the 14th amendment to the Constitution of the United States, unless said decision is modified or reversed. Appellants further insist that they are entitled to reasonable compensation for said land taken to form said "alley", with interest thereon, under the same principle that the Supreme Court of Alabama held (in effect) that appellants were entitled to recover reasonable compensation for land taken by said City to form Elm Avenue. (See *Finley, et als v. Tarrant City, et als.,* ....Ala....., 32 So. 2d 806; *Jones v. New Orleans, etc. R Co.,* 70 Ala., 227; *Thornton v. S.&B. R. Co.,* 84 Ala. 109, 4 So. 197; *City of Birmingham v. Ala. H.B. &L. Assn.,* 231 Ala. 558, 165 So. 187; *City of Birmingham v. Smyer,* 230 Ala., 234, 160 So. 764.

II.

Let us now consider Jackson Boulevard. The claim, or rights of appellants regarding this street may be ascertained by *correct answers* to the following questions: (1)

Did the right of way of the Birmingham Electric Co. (30 ft. by 877 ft.) through appellant's property, or any portion thereof, REVERT to appellant's estate, when it conveyed same to said City of Tarrant in September, 1929? (a) If not, then, DID said City have the LEGAL right, in view of and in the face of the statute, Code Ala., 1940, Tit. 37, Section 528, (Code 1923, Ala., Sec. 2189), to grade, pave or improve said right of way for said Birmingham Electric Co., at said City's expense? Said statute reads, in pertinent part, as follows: *"Assessments as against street car or railroad tracks,'*—If there be a street, electric, or other railroad track or tracks on any street or highway improved or re-improved under this article, *the cost of such improvement,* except storm water and sanitary sewers, between the tracks and rails of the tracks * * * *shall be paid by the owner of such railroad,* and shall be *assessed against* and *form a lien on said railroad,* and the property connected therewith * * *." (Note: *Ala. Traction Co. v. Selma Trust Co.,* 213 Ala. 269, 104 So. 517; *Same case,* 217 Ala., 653, 117 So. 19; *Ala. City v. Ala. P. Co.,* 213 Ala. 644, 106 So. 39; *Day v. Montgomery,* 207 Ala., 644, 93 So. 609; *Mobile v. Mobile, etc. R. Co.,* 226 Ala., 693, 147 So. 606; *Birmingham v. Seaboard, etc. R. Co.,* 227 Ala., 77, 148 So. 425.

In its opinion in this case, the Supreme Court of Alabama held that the Birmingham Electric Co. did not abandon its said right of way (See opinion 32 So. 2d, at page 809; or page 52 of "Statement as to Jurisdiction"). Then, it logically follows that if said right of way was NOT abandoned by said Birmingham Electric Co., and same did not revert to appellants estate, the said Birmingham Electric Co. STILL OWNS SAID RIGHT OF WAY, and under the said above statute of Alabama,

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and the decisions of the Supreme Court of Alabama construing said statute, the said Birmingham Electric Co. was due to pay for said improvement made by said City on its said right of way, and the cost of the said improvement thereof (which was in the sum of $5,000.00 or more) was illegally charged in and added to the assessments of appellant's property, making an UNEVEN, ARBITRARY, DISCRIMINATORY AND ADDED BURDEN ON APPELLANTS, the effect of which was the taking of appellant's property without due process of law, and in plain violation of Section 1 of the 14th amendment to the Constitution of the United States, and which was a denial to appellants of the EQUAL PROTECTION OF THE LAW. (*K.C. So. R. Co. v. Road Improvement, etc.,* 256 U.S. 658, 65 L. Ed. 1151, 41 S. Ct. 604; *Milheim v. Moffatt, etc.,* 262 U.S. 17, 67 L. Ed. 1194, 43 S. Ct. 694. THERE IS NO ESCAPE FROM THIS LOGIC.

Now let us examine the pleadings as to said *illegal items* (relocating said street car track, and improving said right of way for said Birmingham Electric Co.), and adding same to appellant's assessments. We find in the original bill filed August 12, 1935, par. 6, thereof (Tr. 3) that appellants charged that they had been illegally burdened with the cost thereof, that should, under the said law of Alabama been paid by said Birmingham Electric Co. Also, the same charge was alleged in the Substitute Bill filed June 14, 1941, (par. 15(d), Tr. 46). Let us keep this in mind, that the Substitute Bill was filed for the purpose of INCORPORATING into one compact paper or pleading the original bill and all amendments filed thereto. In the instroduction to the Substitute Bill we find the following language (Tr. 37) : "Now come

the complainants and file the following substitute bill in lieu of the original bill and all of the amendments thereto hereto filed in this cause." Now, in Webster's New Inter. Dict. we find "Substitute" defined as follows: "To put in the place of another person or thing; to exchange." In the same dictionary we find: "In lieu of" defined as' "Instead of". It was more convenient to have the original bill and the amendments made thereto ALL INCORPORATED INTO ONE PAPER OR PLEADING, namely, the substitute bill. It was not intended to abandon any issue raised in the original bill and the amendments thereto by filing the substitute bill. The injunction was asked for in the original bill; it was also prayed for in the substitute bill, and allowed by BOTH the lower state court and also by the Supreme Court of Alabama. (In fact, THE APPELLANTS WERE DRIVEN INTO THE EQUITY COURT FOR AN INJUNCTION TO PREVENT SAID CITY FROM TAKING THEIR SAID PROPERTY UNDER SAID ASSESSMENTS WHEN SAID ASSESSMENTS HAD BEEN APPEALED TO THE CIRCUIT COURT. Pending said suit, appellants discovered, by means of interrogatories to said City and otherwise, that said City had also illegally taken certain of their property for streets and said "alley"). Thus, we see that in both the original and also the substitute bills, said charge as to said illegal item was made.

Now, as to the claim of appeallants to the lands taken TO FORM said Jackson Boulevard we find in the substitute bill the following: (Tr. 38, par. 3) "The lots and parcels of land described under the heading "Ordinance 12" in Exhibit A adjoins the street called by the City Jackson Boulevard but complainants aver that said

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Jackson Boulevard is not a public street or highway but all of it belongs to complainants, except that portion that was conveyed by complainant's mother to the Birmingham Electric Co. for the right of way for its street car line many years prior to the doing of the work above mentioned, as will be hereinafter more specifically set forth." In par. 15 (N) (Tr. 47) we find the following: "The so-called streets designated by the City as Jackson Street and Elm Avenue were never dedicated as public streets as required by the laws of Alabama, and the so-called streets belong to complainants. *In par. F of the amendment to the substitute bill,* appellants attempted to make more definite and certain their claim to *Jackson Boulevard* that was abandoned by Birmingham Electric Co. In par. C of the amendment to the substitute bill, the claim as to Elm Avenue was more definitely stated. The Supreme Court of Alabama in its opinion in this case (32 So. 2d, 806),—see also page 53 of "Statement as to Jurisdiction"), as to Elm Avenue is in the following language: "BUT there is a claim originally made an issue by the substitute bill and its answer and set forth in paragraph C of the amended bill, which should receive our consideration. It is the claim for taking the land in Elm Avenue without just compensation". * * * "(2) The court will determine the right, if any, to compensation and the amount thereof, if any, for the land in Elm Avenue alleged to have been taken without conveyance or condemnation. The decree of the court is accordingly corrected so as to show that the bill, as amended, is also retained as to this aspect."

In the case of *Heard v. Brooklyn,* 60 N.Y. 242, also the case of *Strong v. Brooklyn,* 68 N.Y. 1, the street car company sold a portion of its easement or right of way

to the City of Brooklyn to enlarge the public street, which right of way had been acquired by condemnation proceedings. The court held in each case that said portion sold by said street car company, was abandoned and same REVERTED to the estate of the reversionary owners thereof. (See also *The People v. Lawrence,* 54 Barb. (N.Y.) 589; *Penn v. Platt,* 47 Ohio St. 366, 25 N.E. 1028; *Ala. P. Co. v. Dailey,* 31 Ala., App. 44, 18 So. 2d, 142; 20 C.J. page 1236, Sec. 597). The Dailey case, supra, held that it was a question as to intention as to abandonment, which was a jury question. In 20 C.J., page 1234, Sec. (592) 3. NON-USER. (We quote the following): "An easment acquired by condemnation proceedings may be LOST by NON-USER for an unreasonable length of time. (*French v. Bramtree Mfg. Co.,* 23 Pick. (Mass.) 216; *Gross v. Jones,* 85 Nebr. 77, 122 N.W. 681, L.R.A. (N.S.) 47). In section 593, 20 C.J., page 1234, we quote, in part: "* * * There may be *abandonment of a part of a right of way* without an abandonment of the whole". (Citing cases from: Iowa, Mass., N.Y., Ohio). In section 594, (20 C.J., page 1234) we qrote, in part: "Abandonment is made up of two elements, ACT AND INTENTION". (Citing cases). In section 595, (20 C.J., page 1235) we quote, in part: "* * * there must be both a non-user and an intention to abandon",—Citing cases, *Newton v. Mfg. Co.,* 115 Fed. 781, 53 C.C.A. 599; *Tenn., etc. R. Co. v. Taylor,* 102 Ala., 224, 14 So. 379.

In the instant case, the Birmingham Electric Co., by condemnation proceedings acquired said right of way in 1916 through appellant's lands. Since 1916 to the present time, there has been a NON-USER of all of said right of way, except the Ten (10) feet reserved for its single track railway. There clearly has been an abandonment by

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act—NON-USER. But we find also that there was bandonment by INTENTION also. For in its said deed of conveyance of said twenty (20) feet of said right of way to said City of Tarrant we find said INTENTION clearly expressed thus: "IT BEING THE INTENTION of the parties hereto that this CONVEYANCE shall and DOES hereby grant to the said City of Tarrant City ALL OF THE RIGHT, TITLE, AND INTEREST OF THE BIRMINGHAM ELECTRIC CO. IN AND TO SAID STRIP OF LAND 30 ft. wide used by the Birmingham Electric Co. for a street railway, right of way, etc., * * * reserving the right to operate a SINGLE TRACK railway on said street (Jackson Boulevard), etc.," (Tr. 135), or see page 34 of "Statement as to Jurisdiction"). So, in this case we have the INTENTION plus the ACT. Also, shortly after execution of said deed by said Birmingham Electric Co. and said City, the City paved with CONCRETE PAVEMENT SEVEN (7) INCHES THICK all of said 20 feet abandoned by said Birmingham Electric Co. DOES Non-user of a right of way for 32 years amount to an abandonment thereof? DOES the intention expressed in the DEED of CONVEYANCE MEAN WHAT IT SAYS? DOES the fact that said 20 feet was paved WITH PORTLAND CEMENT CONCRETE PAVEMENT indicate an abandonment? (As to the paving of 7 inches thick, see Tr. 79,—or on page 21 of "Statement as to Jurisdiction"). THERE CERTAINLY COULD NOT BE ANY MORE CONVINCING EVIDENCE OF SUCH ABANDONMENT.

Now, let us consider Ordinance No. 38, adopted in 1929, and see if it IMPAIRS THE OBLIGATIONS OF THE CONTRACT said City made on July 7, 1924,

with Mrs. N. J. Finley, mother and predecessor of appellants in title to said lands. In said contract of July 7th, 1924, as the *consideration* of said right of way for said Jackson Boulevard said City agreed (Tr. 129) or see "Statement as to Jurisdiction", page 24-25), in part: "As a part of the CONSIDERATION HEREOF, it is understood and agreed that the Town (Tarrant City) shall at ITS OWN EXPENSE, AND WITHOUT EXPENSE TO VENDORS (Mrs. N. J. Finley—(in substance) rebuild fences—build retaining wall to protect fine spring on edge of said street—"It is further understood and agreed that said Town shall *grade both sides of said strips of land* (meaning the land forming said Jackson Boulevard—interpolation ours) within a reasonable time, making the same reasonably suitable for the use of the public as a street". The only consideration to be paid said Mrs. N. J. Finley for said strips of land was "the relocating fences," "build a retaining wall" and "GRADING" said two strips of land for a street thereby making Mrs. Finley's adjacent lots salable as lots on which to build. None of which was done until 1930, when same was GRADED AND PAVED and all of the cost thereof (INCLUDING THE SAID GRADING) was assessed against said property of Mrs. Finley in violation of the said obligations of said contract of July 7, 1924.

Now, let us see what part of said Ordinance No. 38, adopted by said City in 1929, and AFTER and SUBJECT to the said contract of July 7, 1924) IMPAIRS THE OBLIGATIONS OF SAID CONTRACT OF July 7th, 1924. In Section 3 of said Ordinance No. 38, we quote the following: "That the cost of constructing said improvements S H A L L B E A S S E S S E D AGAINST THE PROPERTY ABUTTING ON

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THE PORTIONS OF THE HIGHWAY SO IMPROVED." (Tr. 89), or see page 22 of "Statement of Judisdiction). Pursuant to said Ordinance said City assessed the GRADIING and all other costs of said improvements against said property of appellants, IN PLAIN VIOLATION OF SECTION 10, of ARTICLE 1 of the Constitution of the United States. (See: *Northern Ohio T. & L. Co. v. State of Ohio,* 38 S. Ct. 196, 245 U.S. 574, 62 L. Ed. 481; *Rees v. City of Watertown,* 86 U.S. 107, 19 Wall. 107, 22 L. Ed. 72).

"Local practice will *never be allowed* to defeat a plain assertion of a Federal right".—*Davis v. Wechsler,* 263 U.S. 22, 68 L. Ed. 143, 44 S. Ct. 13. "The law of the United States CANNOT BE EVADED by the FORMS OF LOCAL PRACTICE."—*Rogers v. Alabama,* 192 U.S. 226, 48 L. Ed. 417, 24 S. Ct. 257; *Ward v. Love County,* 253 U.S. 21, 64 L. Ed. 758, 40 S. Ct. 418. "When matters nominally of procedure are actually matters of substance, which AFFECT A FEDERAL RIGHT the decision of the State Court is subject to review."—*Centr. Ves. R. Co. v. White,* 238 U.S. 507, 59, L. Ed. 1433, 35 S. Ct. 865; *New Orleans, etc. Railroad Co. v. Harris,* 247 U.S. 367, 62 L. Ed. 1167, 38 S. Ct. 535; *Seaboard, etc. R. Co. v. Renn,* 241 U.S. 290, 60 L. Ed. 1006, 36 S. Ct. 567. "Whether the State Court has denied to appellants rights asserted UNDER LOCAL LAW the protection which the Constitution guarantees, IS A QUESTION upon which the petitioners *are entitled to invoke* the judgment of this Court. Even though the Constitutional protection invoked be denied on NON-FEDERAL GROUNDS it is the province of this Court TO INQUIRE WHETHER THE DECISION RESTS upon a fair or substantial basis."—*Broad River Power*

Co. v. S. C. ex rel., Daniel, 281 U.S. 537, 74 L. Ed. 1023; *Fox River Paper Co. v. R.R. Co.,* 274 U.S. 651, 71 L. Ed. 1279, 47 S. Ct. 669, and cases cited.

In its opinion in this case (32 So. 2d, 806) the Supreme Court of Alabama NEVER COMMENTED ON AND NEVER PASSED ON the question raised by appellants in their pleadings and in their assignments of error as to whether or not Ordinance No. 38, which provided for improvements on Jackson Boulevard, adopted in September, 1929, IMPAIRED THE OBLIGATIONS OF THE CONTRACT made July 7, 1924, by said City and Mrs. N. J. Finley. "United States Supreme Court will TAKE JURISDICTION WHERE NON-FEDERAL GROUND was NOT CONSIDERED BY STATE COURT".—*Grayson v. Harris,* 45 S. Ct. 317, 267 U.S. 352, 69 L. Ed. 652, reversing Harris v. Grayson, 216 P. 446, 90 Okl. 147.

In the substitute bill (par. 15 (m) Tr. 47) we find the following language: "(m) Said proceedings for the construction of said so-called improvements (of said streets, Jackson and Elm Avenue) IMPAIRED THE OBLIGATION OF THE CONTRACT BETWEEN THE CITY AND COMPLAINANT'S MOTHER, in VIOLATION OF THE CONSTITUTION OF ALABAMA AND OF THE UNITED STATES". In par. 9 of the PROTEST filed with said City before said assessments were made final on Sept. 23, 1930, we find the following: "9. For that said laws and ordinances and assessments made thereunder violate the Constitution of Alabama and also the Constitution of the United States". (Tr. 55). The Protest was attached to and made an Exhibit to the Substitute Bill in aid thereof. Also in par. 15 (j) (Tr. 47) of the Substitute Bill we find

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the following language: "The Ordinances under which said so-called improvements were constructed and said assessments were levied are in violation of the 5th and 14th amendments to the Constitution of the United States in that the City has taken complainant's property WITHOUT DUE PROCESS OF LAW AND WITHOUT JUST COMPENSATION". It is to be remembered that the Court overruled the demurrer of respondents (appellees) to the SUBSTITUTE BILL and there WAS NO APPEAL THEREFROM.

It is earnestly insisted that since the Supreme Court of Alabama DID NOT pass on said question as to WHETHER OR NOT ORDINANCE No. 38 IMPAIRED THE OBLIGATIONS OF SAID CONTRACT OF July 7, 1924, which was in said PLEADINGS AND ALSO IN SAID ASSIGNMENT OF ERRORS, and was argued in Brief of appellants, this Honorable Court should grant jurisdiction in this case, under the ruling in the case of *Grayson v. Harris,* supra, decided by this Court in 1925.

It is also earnestly insisted that when the pleadings are carefully ANALYZED as we have attempted to do herein, it will be seen that the Supreme Court of Alabama erred in its decision as to said "Alley" and as to said Jackson Boulevard, and that under its ruling as to Elm Avenue in said case (32 So. 2d, 806), appellants are also entitled to RECEIVE REASONABLE COMPENSATION for said "alley" and also for said Jackson Boulevard. It might be stated that said briefs of both parties to this suit were submitted to the Supreme Court of Alabama WITHOUT ORAL ARGUMENT.

We respectfully direct the Courts attention to our original brief on file in this cause, and to the discussion of

the above enumerated points in our briefs, and submit that the order of dismissal of said appeal should be vacated and the mandate stayed; a re-hearing granted, the cause heard on the merits, and the judgment of the Supreme Court of Alabama be modified or reversed.

Respectfully submitted,

GEO. D. FINLEY,
Counsel for Appellants, Petitioners.

CERTIFICATE UNDER RULE 33, as amended.

I, George D. Finley, Counsel of Record for the appellants and petitioners in the above-styled cause, hereby certify that this petition for re-hearing is presented in good faith and not for delay.

GEO. D. FINLEY,
Counsel for Appellants.

CERTIFICATE OF SERVICE

I, the undersigned counsel for appellants, hereby certify that I have on the date herein designated, served a copy of the foregoing Petition for Re-Hearing and Brief and Argument, on Graham, Bibb, Wingo & Foster, counsel for Appellees. This 13th day of May, 1948.

GEO. D. FINLEY,
Counsel for Appellants.

Service of a copy of the foregoing Petition for Rehearing and Brief and Argument is hereby accepted, this 13th day of May, 1948.

DOUGLASS P. WINGO,
Counsel for Appellees.
By Dorothy Bowie

No. 741. FINLEY ET AL. *v.* CITY OF TARRANT ET AL. Appeal from the Supreme Court of Alabama. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the reason that the judgment of the court below is based upon a nonfederal ground adequate to support it. MR. JUSTICE BLACK took no part in the consideration or decision of this case. *George D. Finley* for appellants. *Douglass P. Wingo, Peyton D. Bibb* and *Needham A. Graham, Jr.* for appellees. Reported below: 250 Ala. 19, 32 So. 2d 806.